Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-456

SIOUX NATION OF INDIANS; the SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION, South Dakota; the SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION, North and South Dakota; the SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION, South Dakota; the SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION, South Dakota; the SIOUX TRIBE OF THE LOWER BRULE INDIAN RESERVATION, South Dakota; the SIOUX TRIBE OF THE CHEYENNE RIVER INDIAN RESERVATION, South Dakota; the SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION, Nebraska; and the SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION, Montana, each for itself and in a representative capacity on behalf of the SIOUX TRIBE or NATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ARTHUR LAZARUS, JR.
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

MARVIN J. SONOSKY
2030 M Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioners.

Of Counsel:
WILLIAM HOWARD PAYNE

September 22, 1975

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
A. The Treaty of April 29, 1868	6
B. The Act of February 28, 1877	8
C. Prior Proceedings	11
D. Proceedings before the Commission	12
E. Proceedings below	15
REASONS FOR GRANTING THE WRIT	
I. The holding of the court below rejecting the Sioux Fifth Amendment claim on grounds of res judicata is wrong, and allowing that decision to stand will perpetrate a grave miscarriage of justice	16
II. The court below should not have invoked res judicata to deny petitioners a decision on the merits of the Black Hills claim given the ambiguity of its 1942 opinion, the failure of the United States to plead or prove res judicata as a defense, and the shameful course of the Government's conduct towards the Sioux Nation	22
CONCLUSION	25

APPENDICES

	App. Page
A. Opinion Below	1
B. Excerpts from opinion of Indian Claims Commission	19
C. Excerpts from Treaty of April 29, 1868 and Act of February 28, 1877	65

App. Page

D. War Department correspondence, November 1875 70

E. Statement by the President, October 29, 1974 73

TABLE OF AUTHORITIES

Page

Cases:

Carpenter v. Shaw, 280 U.S. 363 (1930) 23

Choate v. Trapp. 224 U.S. 665 (1912) 23

Commissioner v. Sunnen, 333 U.S. 591 (1948) 24

Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 437 F.2d 458 (1971) 21

Heiser v. Woodruff, 327 U.S. 726 (1946) 24

Kauffman v. Moss, 420 F.2d 1270 (3 Cir. 1970), cert. denied 400 U.S. 846 (1970) 23

Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 436 F.2d 1008 (1971) 22

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) .. 15, 16, 17, 20

Northern Oil Co. v. Socony Mobil Oil Co., 368 F.2d 384 (2 Cir. 1966) 23

Seminole Nation v. United States, 316 U.S. 286 (1942) 23

Shoshone Tribe v. United States, 299 U.S. 476 (1937) 18

Sioux Nation of Indians v. United States, 33 Ind. Cl. Comm. 151 (1974) 2, 8, 9, 13

Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613 (1942) cert. denied 318 U.S. 789 (1943) 8, 11, 12, 17, 18, 19, 20, 21, 22, 23

Sioux Tribe of Indians v. United States, 146 F. Supp. 229 (Ct. Cl. 1956), 182 Ct. Cl. 912 (1968) 12, 13

Sioux Tribe v. United States, 205 Ct. Cl. 148, 500 F.2d 458 (1974) 5, 12

Page

Cases, continued:

Sioux Tribe v. United States, 2 Ind. Cl. Comm 646 (1954) 12

Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951) 24

Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543 (1968) 21

United States v. Creek Nation, 295 U.S. 103 (1935) 18

United States v. International Bldg. Co., 345 U.S. 502 (1953) 23

United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938) 18

United States v. United States F. & G. Co., 309 U.S. 506 (1940) 24

Universal Constr. Co. v. Fort Lauderdale, 68 So.2d 366 (Fla. 1953) 24

Winnebago Tribe of Indians v. United States, 100 Ct. Cl. 1 (1942) 22

Treaties and Statutes:

Act of March 3, 1863 (12 Stat. 765) 11

Act of August 15, 1876 (19 Stat. 176) 10, 11

Act of February 28, 1877 (19 Stat. 254) 4, 6, 8, 11, 12, 13, 15, 16, 17, 18, 20, 21

Act of March 3, 1887 (24 Stat. 505) 11

Act of October 27, 1974 (Public Law 93-494, 88 Stat. 1499) 14, 15

Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049) 3, 5, 14, 25

Sioux Jurisdictional Act of June 3, 1920 (41 Stat. 738) ... 2, 3, 4, 11, 12, 15, 16, 18, 20, 21, 23, 24, 25

Treaty of April 29, 1868 (15 Stat. 635) 4, 6, 7, 8, 9, 10, 11, 17

25 U.S.C. §70s(c) 2

Treaties and Statutes, continued:

28 U.S.C. §1255(1) 2
28 U.S.C. §2101(c) 2

Miscellaneous:

120 Cong. Rec. H.10579 (10/15/74) 14
Federal and State Indian Reservations 5
Meriam, The Problem of Indian Administration 5
Moore's Federal Practice 24
United States Code Congressional and Administrative News 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

SIOUX NATION OF INDIANS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Sioux Nation of Indians and its eight constituent tribes* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims, entered in this proceeding on June 25,

* The Sioux Tribe of the Rosebud Indian Reservation, South Dakota; the Sioux Tribe of the Standing Rock Indian Reservation, North and South Dakota; the Sioux Tribe of the Pine Ridge Indian Reservation, South Dakota; the Sioux Tribe of the Crow Creek Indian Reservation, South Dakota; the Sioux Tribe of the Lower Brule Indian Reservation, South Dakota; the Sioux Tribe of the Cheyenne River Indian Reservation, South Dakota; the Sioux Tribe of the Santee Indian Reservation, Nebraska; and the Sioux Tribe of the Fort Peck Indian Reservation, Montana.

1975, which denies petitioners just compensation for the taking in 1877 of the Black Hills portion of the Great Sioux Reservation.

OPINIONS BELOW

The opinion of the Court of Claims, together with Judge Davis' dissent, not yet reported, is reprinted in Appendix A hereto. The decision of the Indian Claims Commission, which the court below reversed in material part, appears at 33 Ind. Cl. Comm. 151 (1974), and relevant excerpts** are reprinted in Appendix B.

JURISDICTION

The judgment of the Court of Claims was entered on June 25, 1975. This Court has jurisdiction under 25 U.S.C. §70s (c) and 28 U.S.C. §1255 (1). In accordance with 28 U.S.C §2101 (c), this petition for a writ of certiorari was due on or before September 23, 1975, and thus has been timely filed.

QUESTIONS PRESENTED

Where, as is detailed in the Statement of the Case:

(1) the United States in 1877 acquired the Black Hills portion (gold lands) of the Great Sioux Reservation without the consent of the Indians and under circumstances which led the court below to comment that a "more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history***";

(2) the Court of Claims in 1942—after petitioners had litigated almost 20 years under a 1920 special jurisdictional act to recover just compensation for the taking of the Black Hills—dismissed the Sioux suit with a 76-page opinion which does not state whether the judgment was entered on the merits or for lack of jurisdiction, but which employs language indicating that the dismissal was for lack of jurisdiction;

(3) in 1974, almost 24 years after the Black Hills claim had been refiled by the Sioux pursuant to the Indian Claims Commission Act of August 13, 1946, the Commission ruled that the United States had taken the land under the Fifth Amendment, that the defense of *res judicata* had been waived by the Government, that in any event the 1942 Court of Claims decision was not *res judicata,* and that the Sioux were entitled to judgment against the United States in the amount of $17.5 million, plus interest at 5% from 1877, but subject to the deduction of expenditures for food, rations and provisions furnished to the Sioux under a formula that President Ford subsequently said would "leave the Sioux Indians with nothing"; and

(4) in order to avoid injustice, and even though aware that such action could lead to a judgment on the Black Hills claim of "nearly $103 million," Congress in 1974 passed, and President Ford approved, an amendment to the Indian Claims Commission Act declaring that food, rations and provisions no longer would be deemed payments on a claim;

The questions presented in this case are:

I. Whether petitioners' suit for just compensation under the Fifth Amendment for the taking of the Black Hills gold country is barred as *res judicata* by the 1942 judgment of the Court of Claims dismissing the same claim filed under the 1920 Sioux special jurisdictional act.

** The Commission's opinion runs 92 pages. The portion of the opinion dealing with valuation has been omitted since valuation was not an issue in the Court of Claims.

II. Whether the ambiguous opinion of the Court of Claims in 1942 dismissing the Black Hills case for lack of jurisdiction, like doubtful expressions in treaties and statutes affecting Indians, should be liberally construed so as to preserve petitioners' right to have their claim for just compensation considered on the merits.

III. Whether the doctrine of *res judicata* should be applied in this case given the shameful course of respondent's conduct towards the Sioux Nation and the failure of the United States to plead or prove *res judicata* as a defense.

STATUTES INVOLVED

Articles 2, 11, 12 and 16 of the Treaty of April 29, 1868 (15 Stat. 635), and Articles 1, 2 and 5 of the so-called Agreement of September 26, 1876, embodied in the Act of February 28, 1877 (19 Stat. 254), which form the substantive basis for petitioners' Fifth Amendment claim, are set out in Appendix C.

The Sioux Jurisdictional Act of June 3, 1920 (41 Stat. 738), provided in material part:

> ***That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States ***may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe ***, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims *** to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto ***.

Section 2, clause 1, of the Act of August 13, 1946 (60 Stat. 1049), 25 U.S.C. §70a (1), authorizes the Indian Claims Commission to hear and determine claims of any Indian tribe "in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President***."

STATEMENT OF THE CASE

The Sioux Black Hills case is the largest, the most significant and the oldest Indian claim on record. Generation after generation of Sioux have waited for a fair and honorable judgment on the Black Hills claim as a sign of expiation by the Government for the terrible wrongs the Sioux have suffered.[1] Achievement of this central, overriding tribal goal is the key to the Sioux people making peace with their past, as well as progress in the present.[2] Indeed, to 60,000 Sioux today, particularly

---

[1] The Sioux are a once powerful Indian nation which owned over 60 million acres in 1851, with title recognized by the United States. *Sioux Tribe v. United States*, 205 Ct. Cl. 148, 500 F.2d 458, 460 (1974). The eight tribes which constitute the Sioux Nation today own less than 2,350,000 acres scattered over eight reservations. *Federal and State Indian Reservations*, pp. 279, 291, 433, 489, 492, 496, 498, 500 (G.P.O. 1975). Instead of a self-sufficient economy, unemployment on these reservations ranges from a low of 23% (Lower Brule) to a high of 69% (Crow Creek). *Id.* at 281, 292, 434, 491, 493, 497, 499, 501.

[2] As was observed in Meriam's classic study, *The Problem of Indian Administration* (Inst. for Govt. Research, 1928), at p.

[footnote continued]

the militants at Alcatraz and Wounded Knee, the payment of just compensation by the United States for the taking of the Black Hills in violation of the 1868 Sioux Treaty is the litmus test for whether Indians ever can get justice in the white man's courts. So far the United States has failed the test.

In characterizing the course of conduct by which the United States acquired the Black Hills portion of the Great Sioux Reservation, the Court of Claims observed that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history***." (App. A, p. 6.) Nonetheless, on the theory that it had decided 33 years ago, whether "rightly or wrongly," that the Sioux did not possess a Fifth Amendment claim under the Act of February 28, 1877 *supra*, the court below invoked the doctrine of *res judicata* and reversed an Indian Claims Commission order allowing interest as part of just compensation for the Government's taking. The error of the court's holding, and the adverse impact of its narrow ruling upon current Federal-Indian relations, can be appreciated only in the context of the substantive merits of the Sioux Black Hills claim and, of course, the prior history of this litigation.

A. *The Treaty of April 29, 1868.* Following the so-called Powder River War of 1866-67, the United States and the Sioux entered into the Treaty of April 29, 1868 (15 Stat. 635),[3] under which *inter alia:* (1) the United States confirmed title in the Sioux Nation to the Great

805: "The benevolent desire of the United States government to educate and civilize the Indian cannot be realized with a tribe which has any considerable unsatisfied bona fide claim against the government."

[3] Material portions of the 1868 Treaty are reprinted in Appendix C.

Sioux Reservation embracing virtually all of the present State of South Dakota west of the Missouri River (Article 2); (2) the Sioux surrendered all rights to their country outside the Great Sioux Reservation, subject to Articles 11 and 16 of the Treaty (Article 2); (3) the United States promised the Sioux an off-reservation right to hunt on certain lands in Kansas and north of the North Platte River (Article 11); and (4) the United States recognized a Sioux right to continue to use, but not permanently to inhabit, an area about twice as large as the Great Sioux Reservation "north of the North Platte River and east of the summits of the Big Horn Mountains***," *i.e.*, portions of Nebraska, Wyoming and Montana (Article 16).

The United States made three further major commitments to the Sioux in the 1868 Treaty. First, the Government guaranteed that the Great Sioux Reservation was "set apart for the absolute and undisturbed use and occupation" of the Sioux (Article 2). Second, the Government agreed "that no persons except *** [Federal personnel] authorized to enter upon Indian reservations *** shall ever be permitted to pass over, settle upon, or reside" on the reservation (Article 2). Third, the Government promised that no cession of all or any part of the Great Sioux Reservation would have any force or validity "unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same***" (Article 12).

The Black Hills country of South Dakota lay in the western part of the Great Sioux Reservation, and was well known to be valuable for gold long before execution of the 1868 Treaty. (App. B, pp. 25-6.) For the Sioux, the Black Hills also possessed great religious significance. Petitioners' claim, as more particularly described below, is based upon respondent's unilateral acquisition of the

Black Hills country under the Act of February 28, 1877, *supra*, in violation of the terms of the 1868 Treaty.

B. *The Act of February 28, 1877.* In 1874, a military expedition headed by Lt. Col. George Armstrong Custer reported the presence of gold in paying quantities within the Black Hills. The widespread publicity given Custer's reports stimulated an invasion of the Great Sioux Reservation by substantial numbers of non-Indian gold-seekers. (App. A, p. 2.) Initially, the United States maintained troops on the reservation to enforce the treaty provision barring outsiders. The "gold fever" so increased during the winter of 1875, however, that the Commissioner of Indian Affairs succumbed to the political argument that occupancy of the Black Hills by non-Indians was inevitable, and that the United States should acquire the land from the Sioux.

Pursuing this theme, the Commissioner brought a large Sioux delegation to Washington in May of 1875 to discuss the surrender of the Black Hills country as well as the extinguishment of the off-reservation rights the Sioux possessed under Articles 11 and 16 of the 1868 Treaty. In a meeting with the delegation on June 3, President Grant warned that, if the Sioux refused to sell, "the Government might not make strong efforts to keep them [the goldseekers] out." (33 Ind. Cl. Comm. 151 at 251.) Two weeks later, the Government dispatched the so-called Allison Commission to negotiate with the Sioux for the right to occupy the Black Hills "for mining purposes." *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. 613, 636-38 (Fdg. 11) (1942).

The Allison Commission dickered with the Sioux throughout the month of September 1875 without

success.[4] Upon receiving word of the Commission's failure, President Grant in early November, with the concurrence of the Secretary of War and the Secretary of the Interior, decided that, although non-Indians still were forbidden from entering the Black Hills, the Army would be directed not to enforce the law. This order was kept secret in official Washington.[5]

Simultaneous to its drastic change in military policy, the Grant Administration began to pressure Congress for legislative action that would force the Sioux to sell the Black Hills. Taking up an earlier suggestion by the Commissioner of Indian Affairs, the Secretary of the Interior strongly recommended that Congress, through use of the appropriation power, cut off food supplies (rations) for the Sioux unless the Indians agreed to a land cession. (33 Ind. Cl. Comm. 151 at 253-54.) Congress did not then put this cruel proposal into effect.

Unable to move Congress, the Administration deliberately precipitated a crisis in relations with the Sioux. Specifically, on December 3, 1875, the Secretary of the Interior instructed the Government's agents in Dakota and at Fort Peck, Montana, to notify the Sioux in the Yellowstone and Powder River country west of the Great

---

[4] App. B, p. 27. Interestingly, the Sioux, "realizing the great value of the Black Hills to the United States," offered to sell the land to the Government for $70 million, plus additional compensation for the gold already mined. 33 Ind. Cl. Comm. 151 at 252.

[5] App. A, p. 2; App. B, p. 27. President Grant's secret decision to leave the Great Sioux Reservation open to invasion in violation of the 1868 Treaty is dramatically evidenced by contemporaneous correspondence of the military authorities to which the Court of Claims gave judicial notice (App. A, p. 2). Copies of this correspondence are reproduced in Appendix D. The Army withdrew from the Black Hills about November 17, 1875, and miners thereafter flocked into the area in ever-increasing numbers. 33 Ind. Cl. Comm. 151 at 253.

Sioux Reservation that, unless they returned to the reservation by January 31, 1876, they would be declared "hostiles." Hostile Indians, whether men, women or children, could be shot on sight.

During the winter of 1875-76, the Sioux were hunting off the reservation with the permission of the Government's agents, as they had a right to do under Article 16 of the 1868 Treaty. The severity of the winter made an immediate trek of several hundred miles back to the reservation by men, women and children physically impossible. The Secretary's own messenger could not return until well after the January 31 deadline. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that the order to return had not been followed, and that the Sioux were being turned over to the Army for appropriate military action. (App. A, p. 3; App. B, pp. 27-8.)

Custer was searching for Sioux "hostiles" when he met his famous defeat at Little Big Horn on June 25, 1876. As soon as the news of the battle reached Washington on July 5, during the centennial celebration of this Nation's independence, Congress became so incensed that it attached what the Sioux call the "sell or starve" rider to the Indian Appropriations Act of August 15, 1876 (19 Stat. 176, 192). Under this rider, the Sioux were to receive no further rations until they ceded the Black Hills to the United States and surrendered all rights outside the Great Sioux Reservation. Since most of the Sioux already had been dismounted and disarmed, and were confined to the reservation, they could not hunt. Congress thus gave the Sioux the infamous option to "sell or starve." (App. B, p. 28.)

Armed with Congressional authorization for his conduct, President Grant appointed yet another commission

to negotiate with the Sioux. Despite the ultimatum contained in the 1876 Appropriations Act, the commission proved unable to extract the signatures of more than 10% of the adult male Sioux, including 18-year olds, to a cession agreement—far less than the 75% approval for a land sale required under Article 12 of the 1868 Treaty. *(Ibid.)* Nonetheless, in the Act of February 28, 1877 (19 Stat. 254), Congress unilaterally effected the acquisition by the United States of the Black Hills, comprising 7,345,157 acres, and "abrogated" all off-reservation rights possessed by the Sioux under Articles 11 and 16 of the 1868 Treaty. (App. B, pp. 25,28; App. C, pp. 67-8.)

The Sioux Black Hills claim stems from the premise that the 1877 Act constituted a Fifth Amendment taking of petitioners' property.

C. *Prior proceedings.* During the years after 1877, the Sioux repeatedly sought permission from Congress to present the Black Hills claim to an impartial tribunal. The doors of the Court of Claims initially were closed to petitioners (as well as to other Indian tribes) because the jurisdiction of that court did not extend to "any claim against the government *** dependent on any treaty stipulation entered into *** with the Indian tribes."[6] Finally, a special statute, enacted in 1920, granted the Sioux permission to bring suit in the Court of Claims. (See text, pp. 4-5, *supra.*)

The Sioux filed 13 cases under the 1920 Act, covering a total of 18 claims. The court below dismissed all 13 cases between 1938 and 1949. The Black Hills case, involving the claim at bar, was dismissed in 1942, about 19 years after the suit first had been instituted. *Sioux*

---

[6] Act of March 3, 1863 (12 Stat. 765); section 1 of the Tucker Act of March 3, 1887 (24 Stat. 505).

Tribe v. United States, 97 Ct. Cl. 613 (1942), *cert. denied* 318 U.S. 789 (1943). The central question presented by this petition is whether the 1942 dismissal was on the ground that the 1920 Act so limited the court's jurisdiction as to preclude consideration of a Fifth Amendment taking case like the Black Hills claim, or whether, in 1942, the court assumed jurisdiction, adjudicated the claim on the merits and dismissed on the ground that there was no Fifth Amendment taking.

D. *Proceedings before the Commission.* On August 15, 1950, former Sioux counsel refiled the Black Hills claim in the newly created Indian Claims Commission. Four years later, the Commission dismissed the suit on the ground that the petitioners had failed to prove their case. *Sioux Tribe v. United States,* 2 Ind. Cl. Comm. 646 (1954). On appeal, the Court of Claims first affirmed (*Sioux Tribe of Indians v. United States,* 146 F.Supp. 229 (Ct. Cl. 1956)), but on motion of the Sioux, through new counsel, subsequently vacated its judgment of affirmance and remanded the case to the Commission for a full and complete hearing on the merits. (182 Ct. Cl. 912-13.) On November 19, 1958, only two weeks after the remand, the Commission ordered the case reopened and also announced that it would reconsider its previous decision. *See Sioux Tribe v. United States,* 205 Ct. Cl. 148, 500 F.2d 458, 476-77 (1974).

On November 4, 1960, the Sioux filed an amended petition which reiterated the allegation that the Act of February 28, 1877, *supra,* constituted a taking of Sioux land and rights for which just compensation was payable under the Fifth Amendment, and which otherwise clarified the legal and factual basis for this cause of action. (App. B, p. 30.) Almost six years later, the Government filed its answer, which had been due under

the Commission's rules within 60 days after the amended petition was filed. During the intervening six years, the United States, in January 1961, first unsuccessfully petitioned the Court of Claims for a writ of mandamus seeking to upset the Commission's actions upon remand (182 Ct. Cl. 912-13), next unsuccessfully moved the Commission in June 1961 to dismiss, and, following four years of silence, finally moved for a clarification of the record that the Commission furnished on May 25, 1966. A month thereafter, the Government belatedly filed its answer to the amended petition. Significantly, neither in its amended answer nor in its mandamus petition, motion to dismiss and request for clarification did the United States ever raise the defense of *res judicata.*

Following submission of the amended answer, the pace of litigation before the Commission materially quickened. After a full trial in 1969-70 and while the issue of valuation was still *sub judice,* the Commission ordered oral argument on a series of questions, including whether the Sioux Fifth Amendment claim was barred by the 1942 decision of the Court of Claims.[7] Within two months, the Commission rendered its decision (App. B, pp. 19-64), holding so far as here pertinent: (1) that the Sioux Black Hills land and minerals, including gold removed prior to the 1877 Act, had a fair market value on February 28, 1877, of $17.5 million (33 Ind. Cl. Comm. 151 at 362-63); (2) that by the Act of February 28, 1877, *supra,* the United States took petitioners' property for which just compensation was due under the Fifth Amendment (App. B, pp. 50-2); and (3) that the

---

[7] Order entered December 7, 1973. At the oral argument of December 18, 1973, the Sioux expressly reserved their right to assert that "the issue of res judicata has never been affirmatively raised as a defense by the defendant." (Transcript of argument (Inst. 76), pp. 3-4.)

United States had waived the defense of *res judicata* and that, even if there had been no waiver, the Court of Claims dismissed in 1942 for lack of jurisdiction and not on the merits of the Sioux Fifth Amendment claim (App. B, pp. 29-44).

The Commission also ruled that the United States was entitled to a credit for food, rations and provisions furnished to the Sioux pursuant to the 1877 Act. (App. B, pp. 52-6.) In direct response to the Commission's ruling, Congress amended section 2 of the Indian Claims Commission Act—the only substantive change in that law since its passage on August 13, 1946—to provide that "expenditures for food, rations, or provisions shall not be deemed payments on the claim."[8] In so amending the Act, which under the Commission's offset formula would have wiped out substantially all of petitioners' interlocutory award, Congress was well aware that its action might result in a judgment on the Black Hills claim "in the amount of approximately $100 million." (120 *Cong. Rec.* at H.10579-80 (daily ed. October 15, 1974).) When he signed Public Law 93-494, President Ford also stated that, while the Black Hills claim, with interest, could amount to nearly $103 million, "if such a claim is held to be valid, it would be unfair and unjust to try to avoid paying it by deducting the cost of previously supplied food and provisions."[9]

---

[8] Act of October 27, 1974 (Public Law 93-494, 88 Stat. 1499); *see also* S. Rept. No. 93-863 on S. 3007, printed in *United States Code Congressional and Administrative News*, 93d Cong., 2d Sess., at pp. 6111-15 (1974), and Conf. Rept. No. 93-1446 on S. 3007, *id.* at 6118-19.

[9] The complete text of the President's statement upon signing S. 3007 is reproduced in Appendix E.

E. *Proceedings below.* The Government's appeal to the Court of Claims was limited to the proposition that the Sioux Fifth Amendment claim is barred by *res judicata*, or, in the alternative, that the 1877 Act did not effect a Fifth Amendment taking of the Black Hills. Following enactment of Public Law 93-494, the Government, in essence, conceded its underlying liability on the claim and, as the court below noted, directed its appeal entirely to contesting the payment of interest. (App. A, p. 2.)

On June 25, 1975—99 years to the day after Custer's defeat—the Court of Claims reversed the allowance of interest as part of just compensation on the ground of *res judicata,* and otherwise affirmed the Commission's decision. In so ruling, the court below adopted a "lenient" attitude towards the Government's "explanation of its pleadings" and concluded that, although the issue of *res judicata* had not been expressly pleaded, the United States had shown through argument that it did not intend to waive that affirmative defense.[10] (App. A, pp. 6-7.) The Court of Claims further concluded that its 1942 opinion was *res judicata* on the question of a Fifth Amendment taking, since the Sioux "claim for a taking was well within the [1920] jurisdictional act" and had been rejected by the 1942 court on the strength of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). (App. A, p. 8.) In view of this holding, the court below did not consider petitioners' Fifth Amendment claim on the merits.

---

[10] Respondent not only did not plead the defense of *res judicata,* but also did not attempt to litigate the issue. The Sioux thus were never afforded an opportunity to make a record on the point. The court below took judicial notice, *sub silentio,* of its 1942 opinion, but the pleadings, briefs and records in the 1942 case were not part of the record before the Commission and, therefore, were not before the court below on appeal.

Judge Davis dissented, pointing out that the Court of Claims in 1942 apparently thought it had jurisdiction to decide whether there had been a "taking" of the Black Hills, but no jurisdiction to determine whether the compensation paid by the Government under the 1877 Act was "just" (App. A, p. 18). Judge Davis then observed:

> I am not persuaded that in 1942 the Indians had the opportunity to present their Fifth Amendment claim to a tribunal which deemed itself fully empowered to decide all aspects of that demand on their merits. *(Ibid.)*

REASONS FOR GRANTING THE WRIT

I.

THE HOLDING OF THE COURT BELOW REJECTING THE SIOUX FIFTH AMENDMENT CLAIM ON GROUNDS OF RES JUDICATA IS WRONG, AND ALLOWING THAT DECISION TO STAND WILL PERPETUATE A GRAVE MISCARRIAGE OF JUSTICE.

The validity of the Government's *res judicata* defense depends upon whether the Court of Claims in 1942 dismissed petitioners' suit, filed under the 1920 Sioux special jurisdictional act, on the merits because it did not consider the Black Hills claim to be a Fifth Amendment taking case, or whether the court dismissed because the 1920 Act, in its view, did not authorize it to look behind the 1877 Act to ascertain whether a taking had occurred. The court below held that its 1942 opinion was on the merits, asserting that "suit could not [there] be maintained as for a taking because the facts brought the case under the line of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) * * * [which] held that it was not a taking if the Congress, exercising its plenary power over Indian tribes,

took their land without their consent and substituted for it something conceived by Congress to be an equivalent." (App. A, p. 8.) An analysis of the decisions shows, though, that the court below incorrectly restated what this Court held in *Lone Wolf* and, more significantly, misconstrued its own 1942 ruling in *Sioux Tribe v. United States, supra.*

Lone Wolf v. Hitchcock, supra, was an action to enjoin the Secretary of the Interior from disposing of tribal land under a 1900 Kiowa-Comanche statute on the ground that Congress possessed no legal power to divest the tribe of title unless three-quarters of the adult males agreed to the land cession, as required under the provisions of a treaty comparable to Article 12 of the 1868 Sioux Treaty. This Court held the statute constitutional as an exercise of Congress' plenary power over Indian land, including the power to abrogate treaties. In so ruling, the Court declared that, since "Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which promoted the enactment of this legislation" (187 U.S. at 568), or determine whether the consideration paid was fair. Contrary to the opinion below, this Court in *Lone Wolf* did not pass upon whether the Kiowa-Comanche statute gave rise to a claim for just compensation under the Fifth Amendment. That question was not before the Court.[11]

The Court of Claims in 1942 cited *Lone Wolf* for the proposition that the 1877 Act under which the United

---

[11] "If injury was occasioned * * * by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts." 187 U.S. at 568. In 1942, of course, neither the Court of Claims nor any other court had general jurisdiction to hear and determine Indian tribal claims. *See* text, p. 11, *supra.*

States acquired the Black Hills was constitutional and thus, standing alone, could not serve as the basis for a "legal" claim under the 1920 Act. (97 Ct. Cl. at 668.) In this manner, the court below distinguished such cases as *Shoshone Tribe v. United States,* 299 U.S. 476 (1937), and *United States v. Creek Nation,* 295 U.S. 103 (1935), where this Court allowed just compensation under the Fifth Amendment for the loss of tribal lands.[12] The 1942 Court of Claims noted that, unlike the 1877 Sioux Act which provided for rations, these cases disclosed an "arbitrary taking", effected through executive action later ratified, "without payment or the assumption of an obligation to pay any compensation * * *." (*Id.* at 667.) In short, *Shoshone* and *Creek* presented no problem about inquiring into the motives of Congress or ascertaining the adequacy of the consideration promised because the Government had there evidenced no intent to pay *any* compensation.

---

[12] 97 Ct. Cl. at 673. In *Shoshone*, the military wrongfully moved one Indian tribe onto the treaty reservation of another tribe; this tort was converted into a taking when Congress ratified the wrongful course of conduct by actions supporting the second tribe on the reservation. 299 U.S. at 495-97. In *Creek*, a Federal agent erroneously surveyed the reservation line to exclude tribal land; the error was confirmed and a taking effected when the lands were disposed of by the Government through patents issued by its authorized officers. 295 U.S. 110, 111.

The Court of Claims in 1942 also distinguished *United States v. Klamath and Moadoc Tribes,* 304 U.S. 119 (1938), on the ground that the legislative history of an amendment to the Klamath jurisdictional act, enacted after the court below dismissed for lack of jurisdiction, established that Congress intended the tribal claimant to recover for a Fifth Amendment taking. 97 Ct. Cl. at 675-79. Significantly, in its 1942 decision the court below examined the legislative history of the 1920 Sioux jurisdictional act to demonstrate that Congress was not made aware of any Fifth Amendment claim when that statute was under consideration. *Id.* at 685-89.

Contrary to the 1975 view of the court below (App. A, p. 8), the 1942 Court of Claims did not believe that possible inquiry into whether the Sioux possessed a Fifth Amendment claim stopped at the point where it determined that the 1877 Act was constitutional. Rather the 1942 court pointed out that, although in transactions between private parties, one party cannot fix the terms or consideration and force the other party to accept them, this rule "does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, *unless Congress has clearly granted to the Indians the right to do so.*" (97 Ct. Cl. at 681-82; emphasis added.) Again in a key passage of its opinion, the 1942 court declared, after stating the general rule that determining just compensation in Fifth Amendment taking cases is a judicial function:

> But before this general rule is applicable to Indian cases, consideration must be given to the question of policy and the extent of the plenary authority of Congress to legislate in such a way as it deems proper with reference to the management and control of the property and affairs of the Indian tribes *and the extent to which consent to be sued has been granted,* as well as to the circumstances and conditions under which an implied contract will arise under the Fifth Amendment. The facts must show not only that there has been a "taking" or "misappropriation" by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make "just compensation" ***, *but that Congress has, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy*

of the consideration paid, and has authorized the court to determine, adjudicate, and render judgment accordingly. (97 Ct. Cl. at 683-84, emphasis added.)

In other words, the 1942 Court of Claims recognized that, even where Congress validly has exercised its plenary power over Indian lands, a Fifth Amendment claim might result, but the Court would have no jurisdiction over such a claim *unless* the jurisdictional statute authorized inquiry into "the fairness of what was done or of the adequacy of the consideration paid" and the court found the compensation not to be "just". (See App. A, p. 18, dissenting opinion of Judge Davis.) The question of compensation "if injury was occasioned" by the exercise of Congress' plenary power, of course, was the question left open in *Lone Wolf*. (187 U.S. at 568, quoted in 97 Ct. Cl. at 673.)

Consistent with the foregoing analysis, the 1942 court examined into the scope of the 1920 Sioux special jurisdictional act. At the outset the court observed that "[t]he facts and circumstances narrow the legal issue between the parties to the question whether * * * the plaintiff tribe has any legal and enforceable claim within the meaning of section 1 of the jurisdictional act upon which the court has authority to inquire into the wisdom of the policy pursued by the Government * * * and the adequacy of the consideration assumed and paid by defendant for the property acquired." (97 Ct. Cl. at 658.) The court then noted that its jurisdiction "must be found within the terms of the jurisdictional act" (97 Ct. Cl. at 663), and that "[s]pecial jurisdictional acts are strictly construed and clear grant of authority must be found in the act." (*Id.* at 664.) Thereafter the court repeatedly declared that the 1920 Act did not empower it to go behind the 1877 Act and to inquire into either the

motives or the wisdom of Congress in approving the legislation or the adequacy of the consideration promised to be paid for the taking of petitioners' lands. (*See, e.g., id.* at 668, 670, 682 and 685.) This ruling as to the narrow scope of the 1920 Act led the 1942 Court of Claims ineluctably to the conclusion that it possessed no authority to determine whether the Sioux were entitled to just compensation under the Fifth Amendment and, therefore, to dismissal of the Black Hills claim for lack of jurisdiction.

For these reasons, the court below in 1975 plainly was wrong in characterizing its 1942 decision as a judgment on the merits and in applying the doctrine of *res judicata* to petitioners' claim for just compensation. The fact remains, however, that the 1942 decision deprived the Sioux of their day in court initially, and that the erroneous 1975 decision, if allowed to stand, will deprive the Sioux of their day in court for all time. For this Court to refuse to intervene, and in effect to give finality to that denial of a full and fair hearing on the substantive merits of the Sioux Black Hills claim, would perpetuate a grave miscarriage of justice.

The inequity worked by the holding of the court below is all the more poignant because, absent *res judicata*, the Sioux clearly would prevail on the merits of their claim for just compensation in this case. Under the Act of February 28, 1877, *supra*, "the Government * * * acquired the [Sioux] property outright." (97 Ct. Cl. at 681.) Even under the Court of Claims' "good faith" test for denying Fifth Amendment protection to tribal land,[13] as distinct from all other private property, such

---

[13] App. A, p. 9; *see Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968); *Confederated Salish and Kootenai Tribes v. United States*, 193 Ct. Cl. 801, 805, 437 F.2d 458, 459-60 (1971).

action would constitute a taking. First, the "good faith" test does not apply where, as here, the United States acquired Indian land for its own account. *Klamath and Modoc Tribes v. United States,* 193 Ct. Cl. 670, 689 n. 25, 436 F.2d 1008, 1017-18 n. 25 (1971). More important, in acquiring the Black Hills, the Government plainly did not act in "good faith". (App. A, p. 6; App. B, p. 52.)

II.

THE COURT BELOW SHOULD NOT HAVE INVOKED RES JUDICATA TO DENY PETITIONERS A DECISION ON THE MERITS OF THE BLACK HILLS CLAIM GIVEN THE AMBIGUITY OF ITS 1942 OPINION, THE FAILURE OF THE UNITED STATES TO PLEAD OR PROVE RES JUDICATA AS A DEFENSE, AND THE SHAMEFUL COURSE OF THE GOVERNMENT'S CONDUCT TOWARDS THE SIOUX NATION.

The 1942 opinion of the Court of Claims in *Sioux Tribe v. United States, supra,* is not a model of clarity. To the court below in 1975, "in 1942 this court did, rightly or wrongly, hold on the merits, in a cause it had jurisdiction of, that the Sioux did not have a valid claim against the United States on account of the taking of the Black Hills * * *." (App. A, p. 14.) Less than five months after its 1942 ruling issued, on the other hand, the court below cited *Sioux Tribe* for the principle that, "in the absence of express Congressional authorization this Court has not the power to determine whether or not just compensation was paid" for a taking of tribal land. *Winnebago Tribe of Indians v. United States,* 100 Ct. Cl. 1, 6 (1942). As Judge Davis commented in dissent, "[i]t is not easy to apply the general principles of former adjudication to this court's decision in 97 Ct. Cl. * * *." (App. A, p. 14.)

As a general rule, if there is a reasonable doubt concerning what was decided by a prior judgment, that doubt must be resolved against the party claiming the estoppel. *Kauffman v. Moss,* 420 F.2d 1270, 1274 (3 Cir. 1970), *cert. denied,* 400 U.S. 846 (1970); *Northern Oil Co. v. Socony Mobil Oil Co.,* 368 F.2d 384, 388 (2 Cir. 1966); *see United States v. International Bldg. Co.,* 345 U.S. 502, 506 (1953). This rule is particularly pertinent where, as here, the United States is asserting a debatable *res judicata* defense against an Indian tribe in relation to which "it has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942). Indeed, as necessary incidents of "the Government's fiduciary obligation" (*ibid*), this Court repeatedly has declared that laws affecting Indians "should be liberally construed" for their benefit (*Choate v. Trapp*, 224 U.S. 665, 675 (1912)), and that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw,* 280 U.S. 363, 367 (1930). The court below seriously erred in neglecting to apply the same liberal standards to construction of its ambiguous 1942 opinion.[14]

The court below also should not have invoked *res judicata* to deny the Sioux a decision on the merits of the Black Hills claim in view of the Government's persistent failure to plead or prove that affirmative defense. (*See* Statement, pp. 13 and 15, n.10, *supra.*) The doctrine of

---

[14] The Court of Claims' strict construction of the 1920 Sioux special jurisdictional act (97 Ct. Cl. at 664) and its equally strict application of the doctrine of *res judicata* (App. A, pp. 13-14) are in sharp contrast to its "lenient" approach to the Government's "ambiguous" pleading allegations (*id.* at 7).

res judicata is judicial in origin, and is based upon a public policy that litigation must come to some end. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). In this case, though, the Government's withholding of its *res judicata* defense for a period of over 15 years following the Court of Claims' remand in 1958 (*see* Statement, p. 13, *supra*) resulted in the Sioux' actually litigating their claim under the Fifth Amendment to an interlocutory decision by the Commission. Moreover, on appeal the United States conceded its underlying liability to pay fair market value for the Black Hills land and minerals. (*See* Statement, p. 15, *supra.*) The court below, therefore, was not in a position to effect an economy in judicial time, to protect either party from litigating the same cause twice or otherwise to implement any public policy which has led the courts to promulgate the doctrine of *res judicata.* Absent a valid policy reason for so ruling, the court below clearly erred in ignoring the Government's waiver and in applying *res judicata* to the Sioux claim merely to save the United States the expense of paying interest as part of just compensation.

Finally, assuming, *arguendo,* that the 1942 Court of Claims did have jurisdiction over the Sioux Fifth Amendment claim under the 1920 Act, the doctrine of *res judicata* is not to be slavishly followed where its application will violate an overriding public policy or result in manifest injustice to a party. *See United States v. United States F. & G. Co.,* 309 U.S. 506, 513-14 (1940); *Spilker v. Hankin,* 188 F.2d 35, 38-9 (D.C. Cir. 1951); *Universal Constr. Co. v. Fort Lauderdale,* 68 So.2d 366, 369 (Fla. 1953); 1B Moore's *Federal Practice,* ¶0.405[11] (1974). The Sioux claim easily fits this exception to the general rule. The course of action by

which the United States acquired the Black Hills from the Sioux—characterized by the court below as probably the most "ripe and rank case of dishonorable dealings * * * to be found in our history" (App. A, p. 6)—is shocking to the conscience. In deference to the public policy expressed in the Indian Claims Commission Act that the ancient wrongs done to Indians be settled for all time, and in order to avoid a manifest injustice to the Sioux Nation after so many years of frustrating litigation, the Court of Claims should not have invoked *res judicata* again to deny petitioners a decision on the substantive merits of the Black Hills claim.[15]

CONCLUSION

The Government has conceded, as the court below held, that it is liable to petitioners herein under section 2, clause 3 ("unconscionable consideration") or clause 5 (violation of "fair and honorable dealings") of the Indian Claims Commission Act. What really is at stake in this case, therefore, is the remaining $85 million of just compensation due for a taking under the Fifth Amendment and, realistically, the immediate destiny of 60,000 Sioux Indians.

An award of $103 million, which amounts to about $1700 for each Sioux man, woman and child, would not constitute an inconsiderable sum for a people whose unemployment rate ranges from 23 to 69 per cent (*see* p. 5, n. 1, *supra*) and whose median family income by all known tests falls far below the poverty line. Without meaning to sound melodramatic, counsel can state

---

[15] Even the court below conceded that, if the Sioux could file suit today under the 1920 jurisdictional act, "whether * * * the same result would have been reached is far from obvious * * *." App. A, p. 9.

unhesitatingly that, after a 100-year wait, an award of only $17.5 million for the cherished Black Hills, which works out to less than $300 per capita, will be thought of by the Sioux as yet another breach of faith by white institutions. Instead of settling an old grievance, this case will become a new grievance, while the long and painful transition of the Sioux from a buffalo hunting culture to a place in modern society will be set back a few more generations.

The Black Hills claim is important—a still living part of our nation's history. Justice and honor require that the Sioux not be told that their case has reached its end without review by the highest court of the land. The petition should be granted.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

MARVIN J. SONOSKY
2030 M Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioners.

Of Counsel:
WILLIAM HOWARD PAYNE

APPENDIX A

In the United States Court of Claims

Appeal No. 16-74

Ind. Cl. Comm. Docket No. 74-B

(Decided June 25, 1975)

THE UNITED STATES OF AMERICA, APPELLANT, v. THE SIOUX NATION OF INDIANS, ET AL., APPELLEES

Craig A. Decker, with whom was *Assistant Attorney General Wallace H. Johnson*, for appelant.

Arthur Lazarus, Jr., attorney of record for the Pine Ridge Sioux Tribe.

Marvin J. Sonosky, attorney of record for the Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe and Santee Sioux Tribe.

William Howard Payne, attorney of record for the Cheyenne River Sioux Tribe and the Sioux of the Fort Peck Reservation, Montana.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG, and BENNETT, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

NICHOLS, *Judge*, delivered the opinion of the court:

This appeal of the Indian Claims Commission's interlocutory order of February 15, 1974, raises essentially the question whether by the Act of February 28, 1877, 19 Stat. 254, and otherwise, the United States took the Sioux Nation's property in the Black Hills, North Dakota, by the power of

eminent domain, or by a course of unfair and dishonorable dealing not amounting to a constitutional taking. In the former case interest is awardable as a part of just compensation and that is the answer of the Commission. In the latter it is not, and that is ours. Appellant admitted on oral argument it was only here to contest the interest. The following colloquy occurred:

> Judge DAVIS: * * * The difference really is, whether the Tribes will be entitled to interest on whatever the valuation is? The Commission came up with
> Gov't. Atty.: 17 million dollars
> Judge DAVIS: Now, originally you were able to take it to wipe out the whole 17 million but now you're no longer able to do that?
> Gov't Atty.: Not on unconscionable consideration.
> Judge DAVIS: But now the whole difference is interest, whether they get paid the interest?
> Gov't Atty.: That's all we're arguing about.

The opinion below, 33 Ind. Cl. Comm. 151, reveals the facts giving rise to the instant claim. By the Treaty of April 29, 1868, 15 Stat. 635, 636, the United States confirmed in the Sioux Nation recognized title to all of the present South Dakota West of the Missouri River, and it agreed to keep unauthorized persons out. The Black Hills portion, acquired in 1877, contained 7,345,157 acres. In 1874 an exploration led by Lieutenant Colonel Custer discovered gold in this area. A large number of prospectors and miners thereafter entered it without consent of the Indians or other warrant of law, and pressure began to build to open the Black Hills to white settlement. At first the Army was stationed to keep the intruders out, but by motion of appellee, and without objection by appellant, we take judicial notice of certain documents which show that President Grant on November 3, 1875, secretly ordered the Army to make no further resistance to the miners going in. At the same time, he decided not to rescind orders theretofore issued forbidding them to occupy the Black Hills country, but in the absence of enforcement, this was ineffectual. The dependence of the Sioux on Government rations was relied on to prevent their making trouble.

The Government now decided to acquire the Black Hills from the Sioux, sending a Commission to negotiate, but it

failed to reach agreement. In December 1875, the Government ordered all Sioux back to their reservation by January 31, 1876, or be treated as hostile. Those outside were hunting and could not return in time; nevertheless the Army was sent to commence military operations against them. The famous defeat of Custer occurred on June 25, 1876. Incensed by this, Congress attached a rider to the Appropriation Act of August 15, 1876, cutting off the Sioux rations until they ceded the Black Hills. Since they could not hunt, until they yielded they would starve.

The Commission was unable nevertheless to get more than 10% of adult male Sioux to agree to cession. This was fatal to a legal acquisition by agreement, since Article XII of the 1868 Treaty provided that no cession of any part of the reservation should be valid unless three-fourths consented.

Congress by Act of February 28, 1877, 19 Stat. 254, resolved the impasse by enacting into law the unratified agreement of September 26, 1876. This yielded up the disputed territory. It included provisions respecting a contemplated removal to Indian Territory, not here relevant. It undertook to educate the Sioux and gave them a right to specified rations until able to support themselves. They had to remain impoverished to continue to enjoy the rations, a condition it seems they have satisfied down to the present day. There were also provisions for land allotments on the parts of the reservation not ceded.

Besides valuing the yielded land as of February 28, 1877 at $17,100,000, the Commission determined that the sum of $450,000 would compensate for the gold removed by miners before the taking date.

The instant claim has had a long history and, as an occasion for lawyers' work and effort, a distinguished one. For the Indians, it has been so far unrewarding. We consider it here to the extent necessary to evaluate appellant's *res judicata* defense.

By Act of June 3, 1920, 41 Stat. 738, the Congress provided a special jurisdiction for this court to adjudicate appellees' claims. It enacted:

> * * * That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States * * * may be submitted to the Court of

BEST COPY AVAILABLE

> Claims * * * for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or for lands of said tribe * * * or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims * * * to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, * * *

The instant claim was presented as one among thirteen, and was dealt with, in a reported decision almost twenty-two years later. *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943). Whether this decision was on the merits, and thus *res judicata* of the claim, or any portion thereof, or whether it merely held the court had no jurisdiction, is the somewhat bizarre question the parties have debated, below and here, and which we must now decide. All the rest of the claims were also dismissed for one reason or another.

After passage of the Indian Claims Commission Act, 25 U.S.C. § 70 and ff., in 1946 the then counsel for the Tribe in 1950 resubmitted the Black Hills claim. The theory then was unconscionable consideration and dishonorable dealings under § 70a (3) and (5). It was assumed then that the 1942 decision did not bar these claims by *res judicata* or collateral estoppel because claims under paragraphs (3) and (5) were new causes of action that were moral in nature and not justiciable under the Special Jurisdictional Act of 1920. Defendant, however, stated in its answer that recovery was denied in the 1942 decision "for want of jurisdiction." Even if defendant had not altered its construction, obviously we would not take the parties' pleadings as binding us as to the meaning of our own reported decision. The Commission entered an order of dismissal and this court published an affirming opinion, 146 F. Supp. 229 (1956). The main reason for the position was that the consideration was not proven unconscionable because the Indians had persisted in trying to prove the value of the property taken from them by an improper method. The Indians by their then counsel admitted they had been paid more than the value of the property on the taking date.

The Indians at this point retained new counsel who obtained an order vacating our judgment of affirmance, for the Commission to reopen the proofs, and to reconsider its former decision if it saw fit to do so. 182 Ct. Cl. 912 (pub. in 1968). The Commission did reopen the proofs and did receive a quantity of new evidence. In 1961 we denied a petition by the Government for mandamus to prevent the Commission allowing the Indians to file an amended petition and for other extraordinary relief. See, *Sioux Tribe* v. *United States*, 205 Ct. Cl. 148, 500 F. 2d 458 (1974).

Since the 1956 decision was withdrawn, we do not now treat it as determinative of anything.

The new decision of the Commission at 33 Ind. Cl. Comm. 151 (1974) is predicated on a theory of a taking by eminent domain, and the Commission would award interest as part of just compensation both for the land and for the pre-taking removal of gold by the miners. The Commission order contemplates a return of the case to it after our review for determination of offsets, but Congress later that year enacted in Pub. L. 93-494, 88 Stat. 1499, that there would not be any offsets for food, rations, or provisions. There are said to have been in contemplation not many other offsets. The Indians we hope are now near the end of the long and weary trail, but how much they realize on the claim turns wholly or almost wholly on the interest question, as it will be obvious, that interest over almost 100 years would many times exceed the principal. If we disagree with the Commission as to its taking theory the findings would justify liability under § 70a(5). The want of fair and honorable dealings seem obvious and this theory will support the award for pre-taking gold removal as well, since under this clause, with an obligation to protect once assumed, injuries inflicted by third parties are compensable. *Aleut Community* v. *United States*, 202 Ct. Cl. 182, 480 F. 2d 831 (1973); *Lipan Apache Tribe* v. *United States*, 180 Ct. Cl. 487 (1967).

In *United States* v. *The Goshute Tribe*, 206 Ct. Cl. ——— (1975), (App. No. 6-74, slip op. 3/17/75), we consider the basis of a dishonorable dealing award under the Act. If the dealings were dishonorable, we held an award under clause

(5) to be allowable even though the Commission might have made an award under some other sections also. As we there pointed out, resort to that section simplifies things by avoiding the necessity to measure whether consideration was conscionable. As the Congress does not want the rations to be used as offsets, *a fortiori* they should not come into the case by way of measuring the conscionability of consideration. If such a measurement had to be made, obviously, we think, the value of the expectations of rations in 1877 would be the value to be considered, and it would be impossible to determine that value, antecedently considered, because the Indians would terminate their right to rations whenever they became prosperous. No one in 1877 could have foreseen that the Sioux would always be poor, as the Commission rightly says. Thus impossibility of measurement makes "unconscionable consideration" inapt as a basis for liability.

We mention this court's requirement for a "special relationship" in *Goshute*, if dishonorable dealings liability is found. We say "Such a 'special relationship' arises when United States officials tender a Treaty to Indians for adhesion." (Slip op. p. 4). A Treaty was tendered the Sioux for adhesion in 1876. However, breach of the obligation to protect the Indians' lands from unwanted intruders, as promised in the 1868 Treaty, reneged on another special relationship. The duplicity of President Grant's course and the duress practiced on the starving Sioux, speak for themselves. A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe.

The Commission's taking theory founders on the bar of *res judicata*. As if doubtful of its reading of the 1942 case, the Commission strained to find an abandonment of this defense by the Government. Defendant did say in its pleadings that we held we had no jurisdiction in 1942, but explains it meant we had no jurisdiction of claims that were moral and not legal. Until after the remand by this court, the claim was actively prosecuted on the new moral grounds created by the 1946 Act. The Government shows it gave clear notice that it relied on *res judicata* as to any matters properly before the 1942 court. After 1969, when it was clear the Indians

relied on a taking theory, the defendant debated the theory in full reliance on the 1942 case. We think the Commission should have accepted the Government explanation of its pleadings, as do we. When it came to write its decision it was well aware the 1942 decision had not been stipulated out of the case. Our policy, and the Commission's, has been to be lenient with the Indians as to whether their original petition allegations, filed before the jurisdictional cutoff, stated the claim on which they were ultimately to recover. It will not do, in cases under the same Act, to trap the Government in pleading allegations that were at best, ambiguous.

It must be a rare thing for a court to write findings and an opinion totalling 76 pages in length, all just to say it has no jurisdiction. This is, however, the Commission's position as to our 1942 decision. Indeed, the Commission really imputes a gross impropriety to this court in making a whole series of positive pronouncements on the legal rights of the parties—in a case over which it holds it has no jurisdiction! The best refutation would be to set forth the opinion at least, *in toto*, but we cannot on such a scale reprint material already available, in face of our over-large printing bills. It is no longer possible to follow the old practice of making such extensive quotes from prior opinions, as used to be usual. In this instance the opinion to be quoted also contains numerous long quotes from opinions still earlier which of course are all also directly available. Therefore we assume the interested reader will obtain our 1942 opinion. We set forth the rationale of that opinion, as we understand it, and next take up the specific passages that are alleged to reveal an admission of no jurisdiction.

The 1942 court, as we read it, analyzed the claim as moral rather than legal. The opinion starts out by saying the claim is for alleged taking for public purposes, or misappropriation, by defendant. The suit was specifically for just compensation, with interest, for an alleged taking, but the Government Acts relied on did not amount to an exercise of eminent domain in the court's view. The jurisdictional act did not authorize suit on moral claims. All it did was to remove statute of limitation bars, and bars against suits by Indian tribes, on previously existing rights.

The suit could not be maintained as for a taking because the facts brought the case under the line of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903) and not under the line of *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937); 304 U.S. 111 (1938). The former case held that it was not a taking if the Congress, exercising its plenary power over Indian tribes, took their land without their consent and substituted for it something conceived by Congress to be an equivalent. Then it would be presumed that Congress acted in good faith for the Indians' best interests. The Court would inquire into neither the motives of Congress nor the sufficiency of the intended consideration, as to which Congress was the sole judge. The *Shoshone* line was explained as cases where the Indian land was taken and turned over to others without any real or purported equivalent.

Thus it was perfectly correct to say this court held it had no jurisdiction of "unconscionable consideration" and "dishonorable dealing" claims, these being moral and therefore outside the scope of the jurisdictional act. It is not correct to say it held it had no jurisdiction of the taking claim. The Act was broad enough to open the court to any legal claim, but it had to be a legal claim existing independent of the availability of a forum open to suit, for the jurisdictional act neither created nor enlarged pre-existing legal rights. The claim for a taking was well within the jurisdictional act, but the proofs, it was held, showed no taking. It would not have mattered if the jurisdictional act had been broader, so far as the taking claim was concerned. There was just no valid taking claim, whether a tribunal was provided for its enforcement or not.

It is necessary to understand that the right to just compensation in case of an eminent domain taking is conceived by the court to exist independently of whether the sovereign has provided any forum in which it can be sued.

In further explanation of the 1942 decision, it should be said that while refusing to determine the adequacy of the compensation proffered by the Government for the land, the court was manifestly impressed by the found fact that the expenditure for rations for the Sioux had already reached the

figure of $43,000,000, a substantial sum in those days. This court, too, in considering the moral claims in the withdrawn 1956 decision, deemed the consideration for the land more than adequate. It never apparently occurred to the court either time that the rations were to compensate, not for the land, but for prior destruction of the Indians' mode of subsistence, as found by the Congress in enacting Pub. L. 93-494, *supra*, *U.S. Code, Cong. & Ad. News*, 93d Cong. 2d Sess. 6112-6115 (Senate Rep.) A few years ago this court, in an effort to synthesize the *Lone Wolf* v. *Hitchcock* and the *Shoshone* lines of cases, suggested that in cases of purported exercise of trusteeship control over Indian affairs, and purported substitution of one property right for another, the test to bring a case into the *Lone Wolf* line is whether Congress made a "good faith effort" to ascertain and obtain for the Indians the value of the land. *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 553, 390 F. 2d 686, 691 (1968). In our 1942 decision this test is not articulated, and whether if it had been the same result would have been reached is far from obvious, but need not be and is not considered here, since, as will appear, the bar of *res judicata is* not lifted if a later court disagrees with a prior one.

We now consider the passages in the 1942 decision relied on by the Commission to establish that this court held it had no jurisdiction even of the taking claim.

The first quotation at 33 Ind. Cl. Comm. 199, is from the court's introductory statement at p. 616. It is twisted by the Commission into an admeasurement of our jurisdiction. This quotation from the 1942 opinion says the question is:

> * * * whether, as a matter of law, the plaintiff tribe has a legal or equitable claim under section 1 of the Jurisdictional Act * * *

This was not intended as a discussion of the scope of the Act referred to. The court does this elsewhere and shows that in its opinion the special Jurisdictional Act created no new rights but granted jurisdiction of any legal claim that existed previously, and only wanted a tribunal in which the United States consented to be sued. It cannot therefore mean, as the Commission apparently would have it, that section 1

of the Jurisdictional Act is to be looked to as somehow the source of the claim. The court said at p. 666:

> In the case at bar the jurisdictional act, except so far as concerns the competency of the Indian tribe to sue and the limitation on our general jurisdiction under section 259, title 28, U.S.C., as well as the statute of limitation, created no new right or claim in favor of the tribe not otherwise within the limits of our general jurisdiction. * * *

The second, 33 Ind. Cl. Comm. 199, is from p. 658 of the opinion. It says:

> The facts and circumstances narrow the legal issue * * * to the question whether * * * the plaintiff tribe *has any legal and enforceable claim * * * upon which the court has authority to inquire into the wisdom of the policy pursued by the Government, * * * and the adequacy of the consideration assumed* * * * [Emphasis added by ICC.]

This passage is taken out of context and read with the context it means that once the taking claim is eliminated, all that then remains is whether the court can pursue impermissible inquiries in enforcement of a moral claim. It does not deal with the taking claim based on a violation of property rights created by treaty.

The quote at 33 Ind. Cl. Comm. 200, from the 1942 opinion, at 657–58, is representative but misunderstood. It is worth setting forth in full:

> If the lands or other property rights of plaintiff were misappropriated or taken by the United States *in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties*, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. *But if*, under the circumstances disclosed by the record, *Congress acted within the limits of its authority under the law and the treaty* in acquiring the lands and hunting rights for which it made compensation, *the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover.* [Emphasis added by ICC.]

This considers both alternatives. If plaintiffs can prove a taking claim, they can recover. But if Congress acted within its legal rights, they cannot. This shows clearly that the special jurisdictional act covered the taking claim, as we now hold.

The quote at 33 Ind. Cl. Comm. 201 explains the jurisdictional act just as we have above, *i.e.*, that it created no new legal right but only removed the bar on the Indians suing.

The first quote at 33 Ind. Cl. Comm. 202 agrees with our analysis, saying that in light of established legal principles the plaintiffs cannot recover as for a taking.

The Commission's second quote on that page is from p. 667 of the court opinion. The court said that the 1868 treaty and the 1877 act are not laws giving a valid foundation to the claim. From this the Commission draws the staggering *non sequitur* that the court believed it had no jurisdiction to hear a claim based on violation of rights the Sioux possessed under the Constitution. Of course, the Fifth Amendment, the part of the Constitution involved, protects property rights made valid by some other law. The Commission cannot think the Fifth Amendment created the property rights it shelters, and surely would not be surprised to learn there were property rights before there was a Fifth Amendment, we are sure.

In its quote from the court opinion, p. 668, at 33 Ind. Cl. Comm. 204 the Commission confuses the jurisdiction of the court with the Indians' "legal right to complain", concepts the court carefully separated, and also confuses the right of the court to pass upon the justness and fairness of what Congress did, *i.e.*, the moral claims, with its right to adjudicate the taking claim, which the court had and exercised.

The series of quotes at 33 Ind. Cl. Comm. 206, 207, need not be analyzed in detail. They all are consistent with our view that the court considered it had jurisdiction of a taking claim, but the Indians failed to prove a taking claim, and that it had no jurisdiction of moral claims, which were all the Indians proved, if they proved anything.

The Commission refers to *Winnebago Tribe of Indians* v. *United States*, 100 Ct. Cl. 1 (1942), as confirming its understanding of the *Sioux* case. It follows the latter case and we think the Commission has misunderstood it in the same way.

See also discussion of the 1942 case in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 725, 776–78 (1946), 64 F. Supp. 312, *on pet. for cert. judgment vacated*, 329 U.S. 685 (1947) reciting over three pages the court's handling of the taking claim in the 1942 case, and nowhere thinking to mention the court refused to take jurisdiction of that claim.

Chairman Kuykendall, dissenting, points to the withdrawn decision, *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 239 (1956), wherein this court, then comprised of four of the judges who sat on the 1942 case, and one other, held that Category (2) claims under the Indian Claims Commission Act, 25 U.S.C. § 70a could not be brought by the Sioux because adjudicated unfavorably to them in the 1942 decision. This gives perhaps cumulative support to a conclusion more comfortably based on other grounds.

It is elementary that in Indian Claims Commission Act proceedings a former decision on the merits by a court having jurisdiction is a *res judicata* bar to further litigation of the same claim. *United States* v. *Southern Ute Tribe*, 402 U.S. 159 (1971); *Assiniboine Indian Tribe* v. *United States*, 128 Ct. Cl. 617, 121 F. Supp. 906, *cert. denied*, 348 U.S. 863 (1954). *Res judicata* was defined in *Cromwell* v. *County of Sac*, 94 U.S. 351, 352–3 (1876), in the following terms by Mr. Justice Field:

> In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. *It **is a finality as to the claim or demand in controversy**,* concluding parties and those in privity with them, *not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any **other admissible matter which might have been offered** for that purpose.* Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such

> defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that ***a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy.*** Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.
>
> The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. (Emphasis supplied).

This classic comparison of *res judicata* (same claim) and collateral estoppel (different claims) still provides a current, valid definition of *res judicata*. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 n. 6 (1955); *United States* v. *Moser*, 266 U.S. 236, 241 (1924).

Although hard, the doctrine that even erroneous decisions have *res judicata* effect is ancient in American law and of highest authority. *See*, *Williams* v. *Armroyd*, 11 U.S. (7 Cranch) 423, 432–33 (opinion by Chief Justice Marshall) (1813); *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 373–76 (1940).

Nor do any escape hatches appear. Unlike *Lawlor*, *supra*, there is no conduct by the parties subsequent to 1942 to create a new cause of action. And unlike *Oerlikon Machine Tool*

Works Buehrle & Co. v. *United States*, 121 Ct. Cl. 616, 102 F. Supp. 417 (1952), vacated on other grounds, 138 Ct. Cl. 457, 151 F. Supp. 332 (1957), all of the necessary facts were pleaded in the original suit.

Since in 1942 this court did, rightly or wrongly, hold on the merits, in a cause it had jurisdiction of, that the Sioux did not have a valid claim against the United States on account of the taking of Black Hills, and since it also held it had no jurisdiction of moral claims relating to the same matter, and since in waiving other defenses the Congress did not waive *res judicata* defenses in the Indian Claims Commission Act, the Sioux are now restricted to moral claims under categories (3) and (5) of Sec. 70a, on which interest cannot be awarded as part of just compensation. The Congress which wiped out the rations offset could correct this situation also, but we are without the power to do so. On the ground of dishonorable dealings under category (5), the record made supports the Commission's Order except as to interest, but including the pre-taking removal of gold by miners. The cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

DAVIS, *Judge*, dissenting in part:

I disagree with the court's holding that the decision in 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943), is *res adjudicata* of the Fifth Amendment taking claim now presented by the Sioux Nation.[1]

It is not easy to apply the general principles of former adjudication to this court's decision in 97 Ct. Cl., and both sides can readily cite different parts of that opinion which appear to support the respective positions. The key, as I see it, is that the 1942 court separated an Indian Fifth Amendment claim into two distinct parts—the first being whether there was any "taking" or "misappropriation" at all, and the other being the amount of compensation to be paid by the Government for the "taking." The court thought it had

[1] I concur in the court's other rulings, including that the United States is not precluded from raising the defense of *res judicata*.

power, under the normal jurisdictional act, to determine he former issue but, in considering whether the constitutional measure of "just compensation" had been paid for the "taking", the court felt that it had no competence to weigh or take account of the consideration given the Indians by the United States unless the special jurisdictional act so provided in explicit terms—which in this instance it did not. On this view, the court refused to assess at all the money or value given by the Government in exchange for the Black Hills. It would not decide, because it believed it could not, whether or not this consideration amounted to "just compensation."

The rule we apply today is quite different. In Indian Fifth Amendment cases, we now take account of, and assess, the consideration given by the United States in deciding whether "just compensation" has been given. *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968); *Klamath and Modoc Tribes* v. *United States*, 193 Ct. Cl. 670, 689 n. 25, 436 F. 2d 1008, 1017 n. 25, *cert. denied*, 404 U.S. 950 (1971); *Confederated Salish and Kootenai Tribes* v. *United States*, 193 Ct. Cl. 801, 805, 437 F. 2d 458, 459–60 (1971). For purposes of *res judicata*, the formal issue thus becomes whether this is simply a change, since 1942, in the substantive law of just compensation for Indians or whether it is attributable to a liberalized view of the authority given the courts by the jurisdictional statutes consenting to suit against the United States on Indian Fifth Amendment claims.

This is a difficult question to answer but I prefer the latter response—the so-called "jurisdictional" response [2]—mainly because, in my view, that is the stance taken, on the whole, by the 1942 court. The opinion repeatedly ties its refusal to assess or weigh the consideration (given by the United States) directly to the particular jurisdictional act. *See* 97 Ct. Cl. at 616 (this forms part of the court's opinion, as is made clear by the foreword, on the same page, to the findings

[2] If the 1942 decision was based on a lack of jurisdiction in this court, under the then special jurisdictional act, to take account of the consideration transferred by the Government, *res judicata* is inapplicable because, in that case, the earlier court would have felt precluded by a lack of jurisdiction from delving into one of the significant elements of the Fifth Amendment claim. See A.L.I., Restatement of the Law Second Judgments, Tent. Draft No. 1, § 48.1 (1) (a), § 61.2 (1) (c), pp. 45, 123, 127–130 (1973).

of fact), 657–58, 658, 666, 668, 670, 681, 681–82, 682–83, 683, 685. The court also spends some time emphasizing the strict construction to be given to special jurisdictional statutes. *See* 97 Ct. Cl. at 663–65, 682. Implicit in the whole opinion seems to be the notion that, except where consent to suit is given without qualification for suits against Government corporations (97 Ct. Cl. at 664–65), there is both a general presumption against suability of the United States, and also a special presumption against opening up, for judicial scrutiny, Indian claims challenging a congressional policy deemed at the time to be for the welfare of the Indians (97 Ct. Cl. at 665). The court's position was that "when Congress has desired to open up [the latter type of] claims * * * it has used language clearly indicating that purpose" (*Ibid.*).

This symbiotic relationship between the terms of the jurisdictional act and the court's right to inquire into the extent and adequacy of the consideration is brought out, I think, by two sections toward the close of the 1942 opinion. In one the court says (97 Ct. Cl. at 681–82):

> Plaintiff's position in substance is that one party to a proposed transaction cannot legally fix the terms or consideration and force the other party to accept them. This is true in transactions between private parties dealing at arm's length and on terms of equal authority, but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, *unless Congress has clearly granted to the Indians the right to do so.* [emphasis added] In our opinion this has not been done for "the [jurisdictional] act grants a special privilege to the plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms"—[citing cases]. To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act.

The second excerpt reads as follows (97 Ct. Cl. at 683–84):

> In reaching this conclusion we have kept in mind the principle of law that while the government always has

> the right to take or appropriate any private property for a public use, if it does so, without claim of title and without compensation, there arises an implied contract under the Fifth Amendment, and, therefore, a legal claim for just compensation. * * * But before this general rule is applicable to Indian cases, consideration must be given to the question of policy and the extent of the plenary authority of Congress to legislate in such a way as it deems proper with reference to the management and control of the property and affairs of the Indian tribes *and the extent to which consent to be sued has been granted* [emphasis added], as well as to the circumstances and conditions under which an implied contract will arise under the Fifth Amendment. The facts must show *not only* that there has been a "taking" or "misappropriation" by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make "just compensation" [citing cases] *but that Congress has, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, and has authorized the court to determine, adjudicate, and render judgment accordingly* [emphasis added].

True, the opinion speaks, in the first of these excerpts, of "a moral claim." But this seems to me to be because the court automatically equates claims which cannot be vindicated under the jurisdictional act—because that act should not be read as authorizing an inquiry into fairness of consideration—as necessarily "moral" claims. That does not mean that, in the court's eyes, these claims would fail under the Fifth Amendment if full consent had been given. The latter part of the second excerpt clearly separates the issue of a Fifth Amendment "taking" from that of an inquiry into fairness—and requires that Congress authorize *both* aspects. "The facts must show *not only* that there has been a 'taking' or 'misappropriation' by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make 'just compensation' [citing case], *but that* Congress has, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, *and* has authorized the court to determine, adjudicate, and render judgment accord-

ingly" [emphasis added]. A separate, special authorization in the jurisdictional act to go into the fairness of the compensation seems to be required. The court, in a word, thought it had the jurisdiction to decide whether there had been a "taking" but no jurisdiction to determine whether the compensation paid by the Government was "just." [3]

In the end, the best I can make of the 1942 opinion is that the terms of the jurisdictional act were so entangled in the court's mind with its ultimate determination adverse to the Indians on the Fifth Amendment claim that the Government should fail in its current defense of *res judicata*. The "jurisdictional" component seems to me to have been too large a factor in the 1942 holding to preclude the Nation from its right to show now that the acquisition of the Black Hills was a Fifth Amendment taking, without just and adequate compensation, rather than merely a violation of fair and honorable dealings. I am not persuaded that in 1942 the Indians had the opportunity to present their Fifth Amendment claim to a tribunal which deemed itself fully empowered to decide all aspects of that demand on their merits.[4]

---

[3] The same theme seems to be reflected at the beginning of the opinion when the court says (97 Ct. Cl. at 657–58):

"If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties, *without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking*, plaintiff is entitled to recover. But if, under the circumstances disclosed by the record, Congress acted within the limits of its authority under the law and the treaty in acquiring the land and hunting rights *for which it made compensation*, the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover [emphasis added]."

Note that the court separates the case in which Congress pays no "compensation" from that in which it does pay some "compensation," without suggesting that the court can, under this jurisdictional act, decide whether the "compensation" paid was "just."

[4] Since the court does not reach the question of whether, *res judicata* aside, the acquisition would be such a "taking" without just compensation, I do not reach or discuss that issue.

BEST COPY AVAILABLE

[33 Ind. Cl. Comm. 151]

APPENDIX B

BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX NATION OF INDIANS, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 74-B

Decided: February 15, 1974

* * *

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

The plaintiffs have brought this claim under various clauses of [152] Section 2 of the Indian Claims Commission Act, 25 U.S.C. §70a (1970), seeking additional compensation for this lands and other interest obtained by the United States under the Act of February 28, 1877, 19 Stat. 254. The plaintiffs have also amended their petition, by leave of the Commission, to include a claim for compensation for minerals removed from plaintiffs' lands by nonIndians prior to February 28, 1877.

BACKGROUND OF THE CLAIM AND ISSUES TO BE DETERMINED

The original petition in Docket 74 was filed by the plaintiffs on August 15, 1950. On April 5, 1954, after a trial and the filing of briefs by the parties, the Commission issued an order dimissing Docket 74. *Sioux Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 646. This determination of the Commission was affirmed by the Court of Claims on July 7, 1956, 146 F.Supp. 229.

After obtaining new attorneys, the plaintiffs filed before the Court of Claims motions for a new trial and to vacate the court's judgment of affirmance. In support of their motions, plaintiffs alleged (1) that because of ineffective and inadequate counsel their claims had been decided by the Commission on the basis of an incomplete record; (2) that the Commission erred in not independently investigating their claims; (3) that some of the Commission's findings of fact were not supported by any evidence; and (4) that plaintiffs' rights should not be prejudiced by an erroneous concession of fact by plaintiffs' prior counsel. The court granted the plaintiffs' motions to the extent it vacated its judgment of affirmance and remanded the case to the Commission with instructions that the Commission [153] determine

> (1) whether the claimant Indian tribes are entitled on the basis of the statements made in support of the above motions to have the proof in this case reopened, and (2) if so, to receive the additional proof sought to be offered and on the basis thereof, together with the record already made, reconsider its prior decision in this matter.

Sioux Tribe of Indians v. United States, App. No. 4-55 (Ct. Cl., Nov. 5, 1958).

In accordance with the court's instructions, on November 19, 1958, the Commission decided to reopen the proof in Docket 74 and announced that it would reconsider its previous decision. Subsequently, on November 4, 1960, the Commission allowed the plaintiffs to amend their petition, with the result that the claims based on the Act of February 28, 1877, 19 Stat. 254, were segregated into Docket 74-B, and the claims based on the Treaty of April 29, 1868, 15 Stat. 635, remained in Docket 74.

On October 29, 1968, the Commission ordered that three questions be set for determination in Docket 74-B, as follows:

> 1. What land and rights did the United States acquire from the Sioux by the Act of February 28, 1877, C. 72, 19 Stat. 254, 1 Kappler 168, and what were the exterior limits (a) of the land so acquired and (b) of the area subject to the rights so acquired.
>
> 2. Was there any consideration for defendant's acquisition of land and rights under the 1877 Act and, if so, what constituted such consideration.
>
> 3. If there was no consideration for defendant's acquisition of lands and rights under the 1877 Act, was there any payment for such acquisition?

In response to the first question, plaintiffs submitted a memorandum asserting that under the 1877 act the United States acquired:

> [154] (1) The Black Hills portion of the Great Sioux Reservation containing about 7,345,157 acres, in which petitioners held recognized title pursuant to Article 2 of the Treaty of April 29, 1868, *supra* . . . .
>
> (2) The right of the Sioux under Article 11 of the 1868 Treaty "to hunt on any lands north of the [sic] North Platte, and on the Republican Fork of the Smoky Hill River, as long as the buffalo may

range thereon in such numbers as to justify the chase. . . ."

(3) The lands, interests in lands and other rights held by the Sioux north of the North Platte River and east of the summits of the Big Horn Mountains pursuant to Article 5 of the 1851 Fort Laramie Treaty and Article 16 of the 1868 Treaty. . . .

(4) Three rights-of-way for roads through the Great Sioux Reservation, and the right of free navigation along the Missouri River through the reservation. [Plaintiffs' Memorandum Defining Lands and Rights Acquired by the United States Under the Act of February 28, 1877, pp. 7-9.]

Plaintiffs' memorandum stated that the extent of the rights asserted in paragraphs (2) and (3) would be determined in Docket 74.

In its response to plaintiffs' memorandum, defendant acknowledged that it had obtained from plaintiffs the Black Hills portion of the Great Sioux Reservation, but denied that it had obtained any other compensable interest under the 1877 act.

In decisions entered in Docket 74 on July 8, 1970, *Sioux Tribe v. United States*, 23 Ind. Cl. Comm. 358, and in Dockets 74 and 74-B on November 30, 1970, *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 98, the Commission determined that under Articles XI and XVI of the 1868 treaty the plaintiffs had the right to hunt over certain territories described in the opinions. The Commission further determined that the plaintiffs could recover for the loss of these [155] rights in Docket 74-B only if they could prove that the right had a great value in 1877 than when the plaintiffs obtained them. On December 29, 1970, plaintiffs notified the Commission that they did not intend to pursue their claims for loss of

Articles XI and XVI hunting rights, and did not desire that a trial be set on the question whether any further compensation was due them for the loss of those rights.

The remaining issue under question 1 of the Commission's order of October 29, 1968—plaintiffs' claim based on the alleged acquisition by defendant of rights of way and the right to free navigation through plaintiffs' reservation—was not briefed by the parties until they were instructed to do so by the Commission's opinions of September 13, 1972, 28 Ind. Cl. Comm. 425, 430-31, and November 29, 1972, 29 Ind. Cl. Comm. 180, 184-86. That issue will be determined in this decision.

In response to questions 2 and 3 of the Commission's order of October 29, 1968, plaintiffs' submitted a memorandum asserting

(1) that there was no "consideration" for the lands and rights which the United States acquired under the Act of February 28, 1877 . . . ; (2) that moneys expended by the United States under the 1877 Act were gratuities and were not payments on a purchase price for the lands the United States acquired pursuant to the 1877 Act . . . ; and (3) that even if any new benefits conferred upon petitioners by the 1877 Act were treated as either consideration or payment for Sioux lands, interests in lands and other rights, such consideration or payment (as the case may be) at a maximum consisted of the 1877 capitalized value of the Government's promises with respect to subsistence, less the 1877 capitalized value of the Government's unfulfilled obligations under the Treaty of April 29, 1868. . . . [Plaintiffs' Memorandum Defining Consideration Paid by the United States Under the Act of February 28, 1877, pp. 11-12.]

[156] In its reply to plaintiffs' memorandum, defendant asserted that there was consideration for its acquisition of lands and rights under the 1877 act, which consisted of all monetary and property interests that passed from the defendant to the plaintiffs under the terms of the act. Defendant contended that through June 30, 1951, plaintiffs had received $52,139,223.93 in consideration, in addition to the 900,000 acre tract of land which they received under the 1877 act.

In its memorandum on the consideration issue, defendant also raised the issue whether the decision of the Court of Claims in *Sioux Tribe v. United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943), bars the plaintiffs from asserting that the 1877 act constituted a Fifth Amendment taking of their lands. In their reply memorandum, plaintiffs asserted that the res judicata issue was raised prematurely, and did not respond to it.

On December 18, 1973, the Commission heard oral argument on the res judicata issue and the other issues presented in the parties' consideration memoranda. We shall determine all these issues in this decision.

Trial on the 1877 fair market value of the Black Hills portion of the Great Sioux Reservation was held in two parts, in November 1969 and May 1970. In this decision we shall determine the value of plaintiffs' land.

By its order of November 29, 1972, 29 Ind. Cl. Comm. 180, 187, the Commission permitted the plaintiffs to amend their petition to include a [157] claim for compensation for minerals removed from the Great Sioux Reservation prior to February 28, 1877. In this decision we shall determine the extent of the liability, if any, of the United States for minerals removed from plaintiffs' land prior to its acquisition by the United States.

THE LAND ACQUIRED BY THE UNITED STATES UNDER THE ACT OF FEBRUARY 28, 1877

In Article II of the Treaty of April 29, 1868, 15 Stat. 635, 636, the United States confirmed in the Sioux Nation recognized title to a tract of land which became known as the Great Sioux Reservation, and which consisted mainly of all of the present State of South Dakota west of the Missouri River. Under the Act of February 28, 1877, the United States acquired from the Sioux the Black Hills portion of the Great Sioux Reservation, which is the subject area of the valuation in this decision. It contains 7,345,157 acres and may be defined as follows:

> Beginning at the intersection of the 103rd meridian of west longitude with the northern boundary of the State of Nebraska, then north along the 103rd meridian to the south fork of the Cheyenne River, then down the south fork to its junction with the north fork (Belle Fourche River), then up the north fork of the Cheyenne to the 103rd meridian, then north along the 103rd meridian to the 46th parallel of north latitude, then west along the 46th parallel to the 104th meridian, then south along the 104th meridian [158] to the northern boundary of the State of Nebraska, then east along the northern boundary of Nebraska to the point of beginning.
>
> * * *
>
> [Omitted description of Black Hills land relates to value, which was not at issue before the court below.]

[159] HISTORY

Long before its acquisition from the Sioux by the United States, the potential value of the subject area was known to Americans. During the 1850's and 1860's

official government expeditions and private explorers and prospectors portrayed the Black Hills as an excellent potential agricultural and grazing area, and reported significant discoveries of gold.

[160] In May of 1877 Lt. Col. George A. Custer commanded an exploration expedition into the Black Hills. Members of the expedition discovered gold in paying quantities. The extent of the gold field, however, was not determined. Reports of the gold find were widely circulated and greatly exaggerated by the press. As a result of these reports, and despite a more pessimistic report by a later government explorer, large numbers of American prospectors and miners began to invade the Black Hills. In addition, pressure began to be asserted against the Government to open the Black Hills to white settlement.

In 1875 government officials decided that it would be advisable for the United States to acquire the Black Hills from the Sioux. In order to determine what would be a fair price to the Sioux for the Black Hills, President Grant ordered that a topographical and geological survey be conducted. He appointed Walter P. Jenney, a mining engineer, to head the survey. Jenney was instructed to report on the mineral, timber, and agricultural resources of the Black Hills. After completing his explorations, Jenney reported that he had discovered gold, that the gold field covered an area of not less than 800 square miles, that there was sufficient timber and flowing water for mining operations, that the soil in the area was rich and fertile, that at least one-twentieth of the Black Hills area was susceptible of cultivation, and that there were many other large areas which would afford fine grazing.

In June 1875, the Secretary of the Interior, acting under instructions from President Grant, appointed a commission to negotiate with the Sioux [161] for the cession

of the Black Hills and for the surrender of certain Sioux hunting rights. The commission, which became known as the Allison Commission, met with the Sioux during September 1875. The government negotiators offered a lower price for the Black Hills than the Sioux were willing to accept, and the negotiations ended in failure.

After the failure of the Allison Commission to reach agreement with the Sioux, the Grant Administration altered its policy. In November 1875 the President decided that the United States would no longer fulfill its obligation under Article II of the 1868 treaty to keep unauthorized persons out of the Great Sioux Reservation. He ordered that the Army be removed from the Black Hills, and that no further opposition be offered to miners attempting to enter the hills. In addition, President Grant, and members of his administration, began to assert pressure against Congress for unilateral action to acquire the Black Hills.

Without waiting for congressional action, the executive branch precipitated the Sioux situation into a crisis. On December 3, 1875, the Secretary of the Interior instructed the Commissioner of Indian Affairs to direct agents at all agencies in Dakota and at Fort Peck to notify the Sioux in the Yellowstone and Powder River areas in the unceded Indian territory[1] that unless they returned to their reservations by January 31, 1876, they would be declared hostile and would be treated accordingly by [162] the Army. Most of the Sioux who were in the unceded territory during the winter of 1875-76 were hunting with the permission of their agents, as they had a right to do under Article XVI of the 1868 treaty.

[1] Article XVI of the 1868 treaty provided that the area north of the North Platte River and east of the Big Horn Mountains was to be held and considered to be unceded Indian territory.

Furthermore, the severity of the winter made it impossible for them to return to their agencies. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that his order had not been complied with, and that the Sioux were being turned over to the Army for appropriate military action.

In the spring of 1876 the Army commenced military operations against the Sioux. On June 25, 1876, the Seventh Cavalry, under the command of George A. Custer, was defeated in a battle with the Sioux, in which 259 soldiers, including Custer, were killed. When news of the battle reached Washington, Congress was so incensed that it attached a rider to the appropriation act of August 15, 1876, which provided that the Sioux would receive no further rations until they ceded the Black Hills to the United States. Because most of the Sioux had been disarmed and were thus unable to hunt, the provision meant that unless the Sioux surrendered the Black Hills they would be allowed to starve.

Despite the ultimatum contained in the appropriations act, the commission which was appointed to negotiate with the Sioux was unable to get more than 10% of the adult male Sioux to assent to a cession agreement. Article XII of the 1868 treaty provided that no cession of any portion of the Great Sioux Reservation would be valid unless approved by three-fourths [163] of the adult male Sioux. Although the 1876 agreement did not satisfy the requirements of this section, Congress effectuated its terms by enacting the Act of February 28, 1877, *supra.*

VALUATION OF THE SUBJECT AREA

[Remainder of p. 163, pp. 164-94, and a portion of p. 195 are omitted, since the issue of value was not raised by respondent before the court below.]

* * *

[195] 1942 COURT OF CLAIMS DECISION

Plaintiffs contend that the Act of February 28, 1877, *supra*, constituted a taking of the subject tract by the defendant under the Fifth Amendment without the payment of just compensation to plaintiffs. Defendant, on the other hand, argues that plaintiffs' Fifth Amendment claim is barred by the doctrine of res judicata, having been decided by the Court of Claims in *Sioux Tribe v. United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943). For the reasons indicated below, we hold that plaintiffs' Fifth Amendment claim is not barred by the 1942 Court of Claims decision.

[196] "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits." *Hughs v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866). As it is clear that the same parties are now before the Commission as were before the court in 1942, and that the court was faced with the same Fifth Amendment taking claim[8] as is the Commission, the only question to be answered in determining whether or not the 1942 decision bars plaintiffs'

---

[8] The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant, by the act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73,781,826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851.

Sioux Tribe, supra, at 657.

current claim is whether that case was decided on its merits.

It is settled that the judgment of a court dismissing a suit for lack of jurisdiction is not a judgment on the merits and therefore does not bar a future suit on the same cause of action. *Smith v. McNeal*, 109 U.S. 426, 429 (1883); *Hughs v. United States, supra; Walden v. Bodley*, 39 U.S. (14 Pet.) 156, 161 (1840); *see General Investment Co. v. Lake Shore & Michigan Southern Ry*, 260 U.S. 261, 288 (1922). If, as plaintiffs argue, the Court of Claims dismissed their claims in 1942 for lack of [197] jurisdiction plaintiffs are not barred from reasserting that claim.

The land claim in Docket 74-B is being litigated within the confines of the Amended Petition filed by plaintiffs on November 1, 1960, and the Answer to the Amended Petition filed by defendant on June 28, 1966. *See* Commission's Order Designating Separate Docket Numbers, entered May 25, 1966. In paragraph 4 of their Amended Petition plaintiffs allege the following:

> The claim set forth herein accrued prior to August 13, 1946, and has never been adjudicated or otherwise acted upon by the United States or any agency thereof except as considered in *Sioux Tribe v. United States*, 97 C. Cls. 613 (1942), certiorari denied 318 U.S. 789 (1943). In that case, the Court of Claims ruled that it had no jurisdiction to decide this claim under the special jurisdictional Act of June 3, 1920, c. 222, 41 Stat. 738.

In paragraph 4 of its answer defendant responded specifically to plaintiffs' allegation as follows:

> Answering paragraph 4, defendant admits that the claim set forth in the amended petition accrued prior to August 13, 1946. Defendant also admits

> that a special jurisdictional act was passed June 3, 1920, 41 Stat. 738; *that an action was brought in the United States Court of Claims under that Act but that recovery was denied to the Sioux petitioners in that case because the Court of Claims ruled that it had no jurisdiction to grant the relief requested.* Defendant admits the correctness of the citations reported but denies all other allegations of paragraph 4. [emphasis added.]

It is clear that in its answer defendant has admitted that in 1942 the [198] Court of Claims dismissed plaintiffs' claim for lack of jurisdiction.[9] Therefore the question

---

[9] Defendant's only other reference to the 1942 decision in its answer is in paragraph 30, and reads as follows:

> On May 7, 1923, petitioners herein filed a petition in the Court of Claims against the United States pursuant to the jurisdictional act approved by Congress June 3, 1920, 41 Stat. 738, 4 Kappler 270, entitled *Sioux Tribe v. United States*, in which they sought to recover upon numerous claims, in a single action, including the claims asserted in the present amended petition. On May 7, 1934, petitioners severed their original petition and filed separate and amended petitions setting forth in Cause No. C-531-(7), 97 C.Cls 613 (1942), the same claims here involved. This action was contested by the United States. The Court of Claims, after a full hearing upon the claim, made findings of fact on all matters now presented by the amended petition although it found that it lacked jurisdiction to grant the relief requested. There is, therefore, no genuine issue of fact presented to this Commission for determination. All matters alleged were actually litigated and determined in *Sioux Tribe v. United States*, 97 C.Cls. 613 (1942) and cannot be relitigated in the present case. Petitioners are estopped by the prior factual determinations to the Court of Claims from relitigating the specific issues and factual presentations urged in their amended petition.

In this paragraph defendant is alleging that plaintiffs are collaterally estopped from relitigating any of the facts found by

[footnote continued]

whether plaintiffs' claim was dismissed on its merits or for lack of jurisdiction was resolved by the pleadings. Defendant is precluded from attempting to raise that issue now.

The Commission's reliance on defendant's admission does not result in any injustice to defendant in this instance. A close examination of the court's 1942 decision reveals that the court did dismiss plaintiffs' claim solely on jurisdictional grounds, and did not rule [199] on the merits of the Fifth Amendment taking claim.[10]

In stating the issue before it, for example, the court made it clear that it was concerned primarily with questions of jurisdiction. Thus in its introductory statement on page 616 it stated,

> The question now before the court under Rule 39(a) is whether, as a matter of law, the plaintiff tribe has *a legal or equitable claim under section 1 of the Jurisdictional Act on which it is entitled to judgment under these treaties or any law of Congress for any amount due from the United States as for the misappropriation of any lands of said tribe* or for the failure of the United States to pay said tribe any money for other property due under any treaties or laws of Congress. [Emphasis added.]

---

the court in 1942. Nothing in this paragraph is inconsistent with defendant's prior admission in paragraph 4.

[10] At oral argument, defendant's counsel asserted that a comparison of the jurisdictional act under which the Sioux claim was brought with other special jurisdictional acts indicated that the Court of Claims did have jurisdiction over a Fifth Amendment taking claim. However, the issue whether the court in fact had jurisdiction over such a claim is not material to our determination. Our only concern in determining defendant's res judicata defense is whether the court itself believed that it had jurisdiction over plaintiffs' claim.

In again stating the issue before it on page 658 of its opinion, the court used the following language:

> The facts and circumstances narrow the legal issue between the parties to the question whether under the treaties of 1851 and 1868 and the act of February 28, 1877, the plaintiff tribe *has any legal and enforceable claim within the meaning of section 1 of the jurisdictional act upon which the court has authority to inquire into the wisdom of the policy pursued by the Government*, pursuant to which the acts of August 15, 1876, and February 28, 1877, were enacted, *and the adequacy of the consideration assumed and paid by defendant for the property acquired under those acts.* [Emphasis added.]

The questions before it, therefore, as seen by the court, were whether plaintiffs' claim was enforceable under the jurisdictional act, [200] and whether under the jurisdictional act the court had the power to question congressional policy or the adequacy of the compensation promised by the defendant under the 1877 act.

Also, at the beginning of its opinion the court set out the requirements for recovery by plaintiffs. It was again speaking in jurisdictional terms. It stated,

> If the lands or other property rights of plaintiff were misappropriated or taken by the United States *in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties*, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. *But if*, under the circumstances disclosed by the record, *Congress acted within the limits of its*

> *authority under the law and the treaty* in acquiring the lands and hunting rights for which it made compensation, *the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover*. [p. 657-58, emphasis added.]

Thus, under the jurisdictional act, plaintiffs could not recover unless the acquisition of their property under the 1877 act was in violation of the 1868 treaty, and was outside the scope of congressional authority under the treaty and the law relating to Congress' control over Indian property. If Congress had the legal authority to acquire plaintiffs' property under the 1877 act, in the court's opinion, the jurisdictional act allowed for no recovery by plaintiffs.

After thus stating the issues before it, and summarizing the facts of the case, the court devoted more than two pages of its decision to discussing the law regarding waiver of sovereign immunity by Congress. [201] The court stated that special jurisdictional acts waiving such immunity must be strictly construed. It concluded that a court's jurisdiction to hear a claim must be found within the terms of its jurisdictional act, and that no suit could be maintained against the United States on a claim not clearly within the terms of that act.

The court then addressed itself specifically to the Sioux jurisdictional act.

> In the case at bar the jurisdictional act, except so far as concerned the competency of the Indian tribe to sue and the limitation on our general jurisdiction under section 259, title 28, U.S.C., as well as the statue of limitation, created no new right or claim in favor of the tribe not otherwise within the limitations of our general jurisdiction. *Green v. Menominee Tribe*, 233 U.S. 558, 570, 571. *Whitney v. Robertson*, 124 U.S. 190, 194, 195. [p. 666.]

The first of the cases cited by the court supports its conclusion that special jurisdictional acts do not create new causes of action, but rather merely permit tribes to sue. The second case it cited, however, *Whitney v. Robertson*, does not support this conclusion. Rather it stands for the proposition that Congress has the exclusive authority to determine whether the United States will continue to honor treaty commitments, and that the courts cannot be used as a vehicle to challenge congressional action on the grounds that that action violates previous treaties. When read in light of *Whitney v. Robertson*, the court's statement means that it interpreted the Sioux jurisdictional act as not giving it the power to question the judgment of Congress in violating treaty commitments to the Sioux.

[202] The courts next pronounced its holding in the case, using the following language:

> A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, *and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other* leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe." [p. 666, emphasis added.]

It was again talking in terms of the plaintiffs' right to recover under the provisions of the jurisdictional act.

In our opinion, the discussion which follows, on pages 667 through 669 of the opinion, is the key to the court's decision. The court stated as follows:

In the case at bar the claim made by plaintiff for compensation as for a taking of its land and hunting rights is fundamentally predicated upon the provisions of articles 2 and 12 of the treaty of 1868. This claim is attempted to be sustained on the sole ground that the action of Congress, with the approval of the President, in requiring the tribe to give up a portion of its reservation and hunting rights to the Government was not in conformity with the provisions of article 12 of the treaty of 1868 with reference to the consent of three-fourths of the tribe to a cession. This is necessarily the sole ground upon which the claim could be made because there was no law of Congress relating to this claim granting plaintiff any rights which have not been faithfully fulfilled. The act of 1877 is not a law supporting the claim because everything that act promised has been given, and also because that statute was the act of the Government which gave rise to a claim of plaintiff, if it has one, under the treaty of 1868. [p. 667.]

It is clear from this paragraph that the court interpreted the jurisdictional act as giving it power only to hear legal claims against [203] the United States, which claims must have been based on violation of legal rights possessed by the Sioux under treaties or laws of Congress. The court was saying that plaintiffs' claim must necessarily be based on Congress' violation of plaintiffs' alleged right, under Article XII of the 1868 treaty, to refuse to cede their land, because that is the only right, granted by treaty or act of Congress, which could possibly have been violated by the 1877 act. It is apparent from this paragraph that the court did not believe it had jurisdiction to hear a claim based on violation of rights the Sioux possessed under the Constitution of the United States.

After a brief digression,[11] the court continued its discussion as follows:

> [204] As we shall hereinafter attempt to show, we think there is no difference in principle insofar as any legal claim of the plaintiff is concerned between the

---

[11] On page 667, the court briefly distinguished the *Sioux* case from *Shoshone Tribe v. United States*, 299 U.S. 476 (1937), and *United States v. Creek Nation*, 295 U.S. 103 (1935). The court stated that in these two cases there was an arbitrary taking by the Government without payment or the assumption of an obligation to pay, and under such circumstances as to give rise to an implied obligation to pay just compensation. On the other hand, according to the court, in the *Sioux* case Congress in furtherance of a policy which it deemed for the best interest of the Sioux forced them to sell their property to the Government in return for what Congress deemed to be adequate consideration. In the *Sioux* case, the court concluded, "[t]here is, therefore, no room for the conclusion that under the act of 1877 Congress impliedly promised to pay more than what was specified therein. *Baker* [sic] *v. Harvey*, 181 U.S. 481, 492; *Blackfeather v. United States*, 190 U.S. 368, 373."

Neither of the cases cited by the court directly support its conclusion. Neither of them involved an alleged implied obligation to pay just compensation. At the cited page in *Barker v. Harvey*, the Supreme Court was discussing the fiduciary obligation owed by the Government to Indian tribes. The Court stated:

> But the obligation is one which rests upon the political department of the government, and this court has never assumed in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. [181 U.S. at 492.]

In *Blackfeather*, the Supreme Court stated that moral obligations of the Government are for Congress to recognize and that courts have no jurisdiction over them. Reading the statement of the Court of Claims in light of the cases it cites, it is apparent that the court was deciding that because Congress specified the compensation to be paid under the 1877 act the court was without jurisdiction to conclude that there was an implied promise to pay any greater sum.

> power or authority of Congress to do what it did in this case and our authority to pass upon the justness and fairness of what it did, and what was done in other cases without the consent of the Indians and contrary to the provisions of treaty stipulations. In other words, if in the case at bar Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the interest of the Indians, as the facts clearly show was the case, the Indians have no *legal right* to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which has been and is being paid, and will continue to be paid until the Indians, with the assistance of the Government, become self-supporting. [p. 668, emphasis in the original.]

The court was saying that the *Sioux* case is controlled by decisions in other cases. These cases, according to the court, establish that with respect to plaintiffs' legal claim the jurisdiction of the court to pass on the justness and fairness of what Congress did in the 1877 act is determined by the authority of Congress to legislate as it did. Thus [205], if Congress had the authority to do what it did—violate Article XII of the 1868 treaty—the court is without jurisdiction to question the justness or fairness of the 1877 act, and the plaintiffs have no legal claim which the court can adjudicate under the terms of the jurisdictional act.

Relying on *United States v. Kagama,* 118 U.S. 375 (1886), *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), and *Choate v. Trapp,* 224 U.S. 665 (1912), the court then decided that inherent in the 1868 treaty, as an implied condition, was the right of Congress to legislate

as it saw fit with respect to the Sioux, even if such action was in violation of the specific provisions of the treaty. The court then concluded that "[i]n essence, therefore, the present claim is moral, rather than legal. . . ." p. 670. The court's reasoning in reaching this conclusion, although not specifically stated, must have been as follows: A legal claim by plaintiffs could be based only on a right they allegedly possessed, under Article XII of the 1868 treaty, to refuse to cede their land. However, under the 1868 treaty Congress had the inherent power in effect to force plaintiffs to cede their land. Therefore plaintiffs did not have the treaty right to refuse to cede their land, and the acquisition of their land by the United States without their permission could not be the basis for a legal claim under the jurisdictional act.

The court devoted the remainder of its opinion to a discussion of what it described as plaintiffs' "moral claim." It concluded that it had no jurisdiction to hear this claim. The court's language, as shown in the following quotations, clearly establishes that it was ruling solely on jurisdictional grounds:

> [206] In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the *Price* and *Osage* cases [*Price v. United States and Osage Indians,* 174 U.S. 313], and other cases cited, *supra,* was not conferred by the jurisdictional act. We must presume in the circumstances of this case that Congress acted in good faith. [p. 670.]
>
> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of

the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. [p. 673, quoting *Lone Wolf v. Hitchcock, supra,* 187 U.S. at 568.]

. . . but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, unless Congress has clearly granted to the Indians the right to do so. In our opinion this has not been done for "the [jurisdictional] act grants a special privilege to the plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms" [citations omitted]. To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act. [p. 682.]

. . . But before this general rule is applicable to Indian cases, consideration must be given to the question of policy and the extent of the plenary authority of Congress to legislate in such a way as it deems proper with reference to the management and

control of the property and affairs [207] of the Indian tribes and the extent to which consent to be sued has been granted, as well as to the circumstances and conditions under which an implied contract will arise under the Fifth Amendment. The facts must show not only that there has been a "taking" or "misappropriation" by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make "just compensation" [citation omitted], but that Congress had, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, and has authorized the court to determine, adjudicate, and render judgment accordingly. [citation omitted.] [p. 683-84.]

The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented. . . . In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. [citation omitted]. This phase of the claim clearly was not considered by Congress when the jurisdictional act was enacted and we cannot consider and adjudicate it unless and until Congress has unmistakably indicated its intention that we should do so [p. 685.]

The court concluded its opinion with an analysis of the legislative history of the jurisdictional act, which it found

sustained its ruling that it was without jurisdiction to grant plaintiff any relief.

Our conclusion that the court dismissed plaintiffs' claim for lack of jurisdiction is further supported by an examination of defendant's brief before the court, plaintiffs' motion for a new trial, and defendant's brief in response thereto. In its brief defendant set out the jurisdictional limitations which faced the court in dealing with plaintiffs' [208] claim. It argued that the court was constrained to assume that Congress acted in good faith and exercised its best judgment; that the court was without jurisdiction to question the exercise of legislative power; and that if plaintiffs were in fact injured by congressional action it was from Congress rather than the courts that they must seek relief. Specifically with regard to plaintiffs' allegation of inadequate compensation, defendant stated,

> Needless to say, there is no specific or even implied authorization given in the jurisdictional act which would enable the plaintiffs to raise the issue of inadequacy of consideration. The grant of jurisdiction in this case is over claims arising *under* treaties, agreements, or laws of Congress, and not over claims in *contravention* thereof. [Vol. 922 Court of Claims Printed Record, Docket C-531-(7) p. 582. Emphasis in original.]

It is clear that defendant was urging the court to refuse jurisdiction over plaintiffs' claim.

In its motion for new trial, filed July 28, 1942, plaintiffs asserted only one error of law in the court's opinion—the court's holding that it had no jurisdiction to grant any relief to plaintiffs. Plaintiffs argued that the jurisdictional act did give the court jurisdiction to determine whether plaintiffs had been paid just compensation for their lands. In its brief in response to plaintiffs' motion defendant argued that the court was correct in dismissing plaintiffs' claim for lack of jurisdiction. Thus, immediately after the court's decision both parties were of the belief that the case had been decided on jurisdictional grounds.

[209] The court itself, only four months after its decision, stated that the *Sioux* case had been decided on jurisdictional grounds. In *Winnebago Tribe of Indians v. United States,* 100 Ct. Cl. 1 (1942), a just compensation claim was brought under a jurisdictional act similar to that under which plaintiffs had filed their claim. In its opinion, decided by Judges Whitaker, Madden, Jones, Littleton, and Chief Justice Whaley—the same five judges who had decided the *Sioux case*—the court stated,

> . . . Congress, acting as the guardian of an Indian Tribe, has the power to take from it one reservation and to give to it another, if it thinks that this is for its best interest, and in the absence of express Congressional authorization this Court has not the power to determine whether or not just compensation was paid for the one taken. We went into this entire question in great detail in an opinion rendered through Judge Littleton in the case of *Sioux Tribe of Indians v. The United States,* No. C-531-(7), decided June 1, 1942. In that opinion the whole question was carefully and exhaustively discussed. The decision in that case is determinative of the case at bar. (97 C. Cls. 613; certiorari denied, 318 U.S. 789.) [100 Ct. Cls. at 6.]

We conclude that *Sioux Tribe v. United States, supra,* (97 Ct. Cl. 613), was not decided on its merits. Plaintiffs'

Fifth Amendment taking claim is therefore not res judicata and may be asserted here.[12]

[210] Having decided that the 1942 Court of Claims decision does not bar plaintiffs' Fifth Amendment claim, the Commission must still determine the collateral estoppel effect, if any, of that decision. Defendant argues that the Commission is bound by all the factual determinations made by the Court of Claims and cannot readjudicate them. Plaintiffs, on the other hand, argue that because the court did not have jurisdiction over their claim none of its factual determinations are binding in this litigation. The Commission concludes that neither of the parties' contentions is correct.

It is a general principal that a court of competent jurisdiction always has the power to determine its own jurisdiction over cases before it. *See Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *Texas & Pacific Ry. v. Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266, 274 (1926) *Moore's Federal Practice* ¶ 0.405 [.4-1], at 641 (1965). It follows that the Court of Claims had the power to determine the extent of its jurisdiction to grant plaintiffs

---

[12] As an alternative ground for rejecting defendant's res judicata defense, we note that defendant's sole reference to the 1942 decision in its answer, aside from its admission in paragraph 4, was in paragraph 39, quoted in footnote 9, *supra*. In this paragraph defendant is alleging that plaintiffs are collaterally estopped from relitigating any of the facts found by the court in 1942. Defendant is not alleging, in paragraph 39, that plaintiffs' claim is res judicata by virtue of the 1942 decision, nor does it make such allegation elsewhere in its answer. Under sections 11(b) and 11(h) of the Commission's General Rules of Procedure, promulgated July 4, 1947, and which were in effect when defendant filed its answer in Docket 74-B, defendant's failure to affirmatively plead the defense of res judicata constitutes a waiver of that defense. Defendant is therefore precluded from asserting that defense now.

the relief they were seeking. Necessarily, it also had jurisdiction to make those factual determinations essential to its jurisdictional decision. Thus, the rule that determinations of a court lacking jurisdiction are void and not binding is not controlling here.

On the other hand, it does not follow that all of the factual determinations made by the court are binding on the Commission. In order that collateral estoppel apply, the following requirements must be met: the issue sought to be determined must be the same as that involved [211] in the prior litigation; it must have been actually litigated in the prior litigation; it must have been judicially determined in the prior litigation; and the determination of the issue must have been essential to the judgment in the prior litigation. *Moore, supra,* ¶ 0.443. No factual determination made by the court in 1942 is binding on the Commission unless it satisfied all of these requirements.

In adjudicating plaintiffs' Fifth Amendment claim we are concerned with three issues: (1) whether in acquiring plaintiffs' lands under the 1877 act Congress made a good faith effort to give the Sioux the full value of their lands (*see Three Affiliated Tribes of the Fort Berthold Reservation v. United States,* 182 Ct. Cl. 543, 390 F.2d 686 (1968), discussed *infra*); (2) the amount of the compensation paid by the United States for plaintiffs' lands; and (3) whether that payment constitutes just compensation for plaintiffs lands. We are of the opinion that none of these issues was conclusively determined by the court's decision.

The issue whether Congress made a good faith effort to give the Sioux full value for their lands was not decided by the Court of Claims in these exact terms. To determine whether plaintiffs are nevertheless estopped from urging that Congress did not make such an effort

the Commission must determine whether such a contention is necessarily inconsistent with the court's adjudication of any material and litigated issue before it. *See Moore, supra,* ¶0.443 [2], at 3903-04. We have been unable to find any such adjudication.

[212] Initially, we doubt whether the court could have made any determination inconsistent with plaintiffs' contention. Under the court's interpretation of the Sioux jurisdictional act it lacked the power to question whether Congress was acting in good faith. At two points in its opinion the court specifically stated that it must *presume* that Congress acted in good faith. See pages 670 and 673 (quoting *Lone Wolf v. Hitchcock, supra*). Furthermore, even if the court was not precluded from doing so by its ruling on its jurisdiction, it in fact made no determination which would preclude plaintiffs' theory of recovery.

We have examined the 21 findings of fact entered by the court. We have found no factual determination relating to an effort (or lack thereof) by Congress to give plaintiffs the value of their land. In examining the court's opinion we have found only two recitations that might possibly relate to this issue. The first is on page 667. The court said,

> In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay.

The crucial words here are "pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the [213] Indians," and "for that which the Congress . . . deemed to be adequate consideration for what the Indians were required to give up. . . ." The first phrase does not relate to an attempt to give full value. It means only that Congress believed that restricting the Sioux to a smaller reservation would aid them in adapting themselves to farming and herding as means of subsistence, and that removal of the Black Hills from the reservation would allow the Sioux to live free from the costly warfare with white miners. The second phrase means only that Congress thought the payments it pledged were adequate compensation for the Sioux lands. It is not a determination that Congress attempted to measure these payments against the value of the Sioux lands. Certainly in both the school land portion of the *Fort Berthold* litigation (*Three Affiliated Tribes, supra,* 182 Ct. Cl. at 558-60), and in the *Confederated Salish* case (*Confederated Salish and Kootenai Tribes v. United States,* 193 Ct. Cl. 801, 437 F.2d 458 (1971)), Congress deemed what it paid for the Indian lands to be adequate consideration. This fact did not preclude the court in either case from concluding that Congress did not make a good faith effort to give the Indians what their land was worth.

The second possibly binding determination is on page 668, There the court stated,

> Congress possessed the authority to take the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties [214] there was no misappropriation of the land by the

> Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof.

Again, the court's finding that the 1877 act was pursuant to a policy which Congress believed to be just and in the interest of the Sioux is not inconsistent with plaintiffs' contention that Congress did not in good faith attempt to pay the Sioux the full value of their land. The court's conclusion that there was no misappropriation of plaintiffs' lands, in the context of the paragraph and the entire opinion, means only that the 1877 act was not an arbitrary seizure of plaintiffs' lands.

As the question whether Congress made a good faith effort to give the Sioux the full value of their lands was not at issue and was not judicially determined in the Court of Claims litigation, plaintiffs are not collaterally estopped from arguing that Congress did not make such an effort.

Defendant argues that the Court of Claims in its 1942 decision determined the amount of "consideration" that had been paid under the 1877 act through June 30, 1926, and that the Commission is bound by that determination. In its finding of fact 20 the court found as follows:

> By article 5 of that act, the Government assumed an obligation to continue to appropriate and expend such sums as should be necessary for such subsistence "until the Indians are able to support themselves" in return for the Black Hills and hunting rights acquired, and, also added 900,000 acres of grazing land to the permanent reservation. The total of the sums annually appropriated by the Congress to June 30, 1926, in fulfillment of this purpose, for subsistence of the Indians of the Sioux Tribe, including [215] the $3,055,450.53 for the fiscal years 1875 and 1876, was $39,993,962.50, for none of which any legal obligation rested upon the Government other than that assumed and provided for in the act of February 28, 1877. Amounts appropriated for subsistence subsequent to 1926 bring this total to approximately $43,000,000.

As we have stated above, collateral estoppel does not apply unless the issue sought to be determined was actually litigated in the prior litigation. As the Sioux decision was entered under the court's Rule 39(a), which limited the issue to the plaintiffs' right to recover,[13] the questions actually litigated in that stage of the case can be found in the parties' briefs and proposed findings. We have carefully examined the briefs and proposed findings of fact submitted to the Court of Claims by the parties. Neither party proposed any finding of fact relating to the amount of "consideration" that had been paid under the 1877 act. Neither party in their brief made any reference to the "consideration" paid under the act. We must conclude that the "consideration" issue was [216] not

---

[13] *Rule 39(a)*

> In every Indian case unless otherwise ordered by the Court or stipulated by the parties, the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the Court shall enter its judgment adjudicating that right. If the Court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive. [This rule was promulgated by the court on May 1, 1939, as an amendment to its 1936 Rules.]

litigated before the court and that collateral estoppel does not apply to the court's finding on this issue.

On page 685 of its opinion the court stated, "In the absence of a clear grant of authority by Congress, we have no jurisdiction . . . to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender." The court accordingly did not determine whether what Congress agreed to pay under the 1877 act constituted just compensation for plaintiffs' lands. The Commission is therefore free to make its own determination on this issue.

FIFTH AMENDMENT TAKING

In dealing with Indian property, Congress can act in either of two capacities. First, it can exercise a guardianship over the property, derived from its constitutional power over Indian affairs. Secondly, it can exercise its eminent domain power and take the property, in which case it must pay just compensation. *Klamath and Modoc Tribes v. United States,* 193 Ct. Cl. 670, 684-85, 436 F.2d 1008, 1015 (1971); *Three Affiliated Tribes, supra,* 182 Ct. Cl. at 552-53. In the *Fort Berthold* case the court set out the proper guideline to be used in determining which of its two powers Congress has used in dealing with Indian property. If Congress has made a good faith effort to give the Indians the full value of their land, there has been no taking. Congress has merely performed the traditional ficuciary function of transmuting [217] property into money. If, on the other hand, Congress has failed to make such an effort, there has been a taking, and the United States can be liable if just compensation was not in fact paid. *Three Affiliated Tribes, supra,* 182 Ct. Cl. at 553. Application of this guideline to the facts of this case

leads the Commission to conclude that the 1877 act constituted a taking of plaintiffs' property.

An examination of the terms of the 1877 act makes it clear that Congress made no effort to give the Sioux the full value of their land. The major obligations undertaken by the United States under the act are set out in Article 5, which we have quoted in finding of fact 81. In this article the United States agreed, with some conditions; (1) "to provide all necessary aid to assist the said Indians in the work of civilization;" (2) "to furnish to them schools and instruction in mechanical and agricultural arts, as provided by the treaty of 1868;" and (3) "[t]o provide the said Indians with subsistence . . . until the Indians are able to support themselves." The first of these promises was stated in such general terms that it is impossible to ascertain its value. The second promise, as it states, was not a new obligation on the part of the United States. Rather it was a reaffirmation of an obligation already owed under the 1868 treaty.

The third promise—to feed the Sioux—is the only promise that might have some relationship to the value of the property acquired by the United States from the Sioux under the act. However, this obligation [218] was undertaken subject to several conditions. First, no rations were to be supplied unless the Sioux fulfilled every obligation thrust upon them by the act. Second, rations were to be furnished only until the Sioux were considered able to support themselves. Third, no rations were to be supplied to children between the ages of 6 and 14 unless they attended school. Fourth, no rations were to be supplied to any Sioux located on lands suitable for cultivation unless those Indians also provided labor. Given these conditions, it was impossible to determine, at the time the 1877 act was enacted, the extent of the

obligation being undertaken by the United States in exchange for the Sioux property. In short, the amount of money, if any, which the United States was obligated to spend under Article 5 of the act was indefinite and uncertain. The obligation undertaken by the United States under Article 5 clearly had no relationship to the value of the property it was acquiring from the Indians. Moreover, there is no indication in the record that Congress attempted to relate it to the value of plaintiffs' land.

We conclude that Congress did not make a good faith effort to give the Sioux the full value of their property. Congress was therefore not acting as guardian for the Sioux with respect to this property, but was exercising its power of eminent domain in order to allow Americans to freely use the subject area. We hold that the Act of February 28, 1877, *supra*, constituted a Fifth Amendment taking of plaintiffs' property.

[219] COMPENSATION

As we have already indicated, the 1876 agreement did not comply with the terms of the 1868 treaty. It therefore did not effect a transfer of plaintiffs' property to defendant. Rather, defendant acquired plaintiffs' property by means of a unilateral taking under the 1877 act. As the concept of "consideration" necessitates a contractual relationship between the parties (*see Nez Perce Tribe v. United States*, Docket 175, 24 Ind. Cl. Comm. 429, 433 (1971), and authorities cited therein), it follows that no "consideration" has been paid to the plaintiffs for their lands. Whatever compensation has been received by plaintiffs must be considered payments on the claim.

In determining the extent of the compensation received by plaintiffs for their property taken under the 1877 act, defendant is entitled to credit, as payments on the claim, for the value of all property transferred to plaintiffs under the act, and for all expenditures on behalf of the Sioux made by the United States in fulfillment of the new obligations assumed under the act.

Under the Indian Claims Commission Act, the burden of proof with respect to payments on the claim is on the defendant. In the context of this case, this burden requires defendant to establish that all expenditures which it asserts as payments on the claim were actually made in compliance with the terms of the 1877 act. Defendant will receive no credit, as [220] payments on the claim, for expenditures not in compliance with the act. Defendant must also establish the market value of any property which it claims that it transferred to plaintiffs under the act.

In meeting its burden of proof, defendant must relate each expenditure that it claims to a specific obligation assumed under the act. General designations, such as "payment in fulfillment of the Act of February 28, 1877," will be insufficient to entitle defendant to any credit. Nor can defendant receive credit for any expenditure made in furtherance of obligations assumed under other treaties or acts of Congress.

Compensation under the 1877 act, with the exception of property actually transferred to plaintiffs by the act, was not all paid at the time of taking. Rather, under Article 5 of the act, payment of compensation was deferred over time. For the purposes of this case it will be convenient to consider the compensation as having been paid on an annual basis. Defendant is entitled to credit for this compensation as of the time it was paid.

As plaintiffs' property was taken under the Fifth Amendment, plaintiffs were entitled to receive just compensation. Such compensation consists of the fair market value of plaintiffs' property on the date of taking, plus interest on that amount from the date of taking until it is paid. *See United States v. Klamath and Modoc Tribes,* 304 U.S. 119 (1938); *Shoshone Tribe v. United States,* 299 U.S. 476 (1937); *Seaboard Air Line Ry v. United States,* 261 U.S. 299 (1933); *United States v. Rogers,* 261 U.S. [221] 299 (1921). The proper rate of interest to be applied in Fifth Amendment taking claims before the Commission is 5%. *Three Affiliated Tribes of the Fort Berthold Reservation v. United States,* Docket 350-F, 28 Ind. Cl. Comm. 264 (1972), appeal docketed, No. 27-72 (Ct. Cl., December 21, 1972).

Interest on the value of plaintiffs' property (principal), as part of just compensation, began to accrue on February 28, 1877, the date of taking. Interest on the remaining unpaid principal continued to accrue each year until the time, if it has yet occurred, when the principal was fully paid. Thus, in making expenditures in fulfillment of the 1877 act, defendant was obligated to pay both principal and accrued interest.

The proper method for allocating deferred Fifth Amendment payments between principal and interest was established by the court in *Uintah and White River Bands v. United States,* 139 Ct. Cl. 1, 152 F.Supp. 953 (1957), and has been followed by the Commission in *Ponca Tribe v. United States,* Docket 323, 24 Ind. Cl. Comm. 339, 347-48 (1970), *aff'd in part, remanded in part,* 197 Ct. Cl. 1065 (1972), *Three Affiliated Tribes, supra,* 28 Ind. Cl. Comm. 264, and *Lower Sioux Indian Community v. United States,* Docket 363 (Second Claim, Act of 1904), 33 Ind. Cl. Comm. 51 (1974). This method apportions

payments between principal and interest according to the following formula:

$$\frac{\textit{Unpaid principal + accumulated interest}}{\text{Unpaid principal}} = \frac{\textit{Amount of deferred payment}}{\text{Portion of payment allocated to principal}}$$

[222] In this case it will be necessary to apply this formula on a year by year basis to determine how to apportion each year's payment between principal and interest. In this formula as applied to this case, the figure for accumulated interest will include the current year's interest accrual plus the remaining unpaid interest from previous years. If, in applying this formula on a year by year basis, the point is reached where principal has been completely paid, interest will cease to accrue, and all further payments will be charged against previously accrued interest.

We have briefly examined the accounting reports submitted by the defendant in the Court of Claims litigation and those submitted to the Commission, which reports we assume will be relied on by defendant to support its assertions of payments on the claim. We are of the opinion that these reports are not in a form which would allow the Commission to ascertain the compensation paid by defendant in accordance with the guidelines set out above. To enable us to determine the extent of defendant's payments on the claim, and thus whether plaintiff has been paid just compensation, it will be necessary for defendant to prepare a new statement in support of its assertions. Such statement should include only expenditures made in fulfillment of obligations assumed under the 1877 act. These expenditures should be broken down on a year by year basis. Each expendi-

ture must be shown to be in strict compliance with the terms of the 1877 act.

[pp. 223-32 and a portion of p. 233 are omitted because the issues there discussed were not raised in the court below.]

* * *

[233] This case shall proceed to a determination of the amount of compensation received by plaintiffs under the 1877 act, including the value of any property transferred to plaintiffs under the act; and to a determination of the value of the road rights of way acquired by the United States under the 1877 act.

/s/John T. Vance
John T. Vance, Commissioner

We concur:

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

[Two maps appearing at pp. 234-35 are omitted.]

* * *

[236] Kuykendall, Chairman, dissenting in part:

I disagree with the majority's conclusion that the plaintiff's Fifth Amendment claim is not barred by res judicata by virtue of the opinion and decision of the Court of Claims in *Sioux Tribe v. United States,* 97 Ct. Cl. 613 (1942), *cert. denied,* 318 U.S. 789 (1943).

When the Court of Claims' decision is considered as a whole it becomes clear that the court squarely ruled on and denied the Sioux claim that there was a Fifth Amendment taking and dismissed any "moral claim" on jurisdictional grounds. In support of this view, I set forth below some of the pertinent language of the court together with my comments. The quotations from the court's opinion are single spaced.

The claim which the Sioux Tribe brought before the Court of Claims pursuant to the Jurisdictional Act of June 3, 1920, was based on the contention that the Act of February 28, 1877, constituted a taking of a portion of the Sioux reservation under the Fifth Amendment without the payment of just compensation to the Sioux.

> Plaintiff seeks to recover $189,368,531.05, together with an additional amount measured by interest as a part of just compensation amounting in all to approximately $739,116,256 for the alleged taking by the defendant in 1877 of certain lands, and rights in lands of the plaintiff, amounting to 73,781,826.19 acres, alleged to have been contrary to and in violation of provisions of treaties of September 17, 1851, 11 Stat. 749, and April 29, 1868, 15 Stat. 635. [p. 616]

* * *

The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant by the [237] act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73,781,826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and proclaimed February 24, 1869, 15

Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851. [p. 657]

The Court of Claims had jurisdiction of the claim, and the Sioux Tribe would have been entitled to recover if their contention was valid.

> If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. [pp. 657, 658]

The Court of Claims considered the merits of the Sioux Fifth Amendment taking claim and determined that the Sioux were not entitled to recover.

> A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe." [p. 666]

The Court of Claims determined that the Sioux claim was moral rather than legal.

> [238] In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the *Price* and *Osage* cases, and other cases cited, *supra,* was not conferred by the jurisdictional act. [p. 670]

The court held it did not have jurisdiction to consider moral claims.

> . . . To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act. [p. 682]
>
> * * *

The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented. Compare *Choctaw Nation v. United States,* 119 U.S. 1, 2, 28, 29; *Winton v. Amos,* 255 U.S. 373, and *Seminole Nation v. United States,* 316 U.S. 286 (No. 348), decided May 11, 1942. While in a proper case the court may adjudicate a claim on equitable principles relating to fraudulent acts of those charged with the duty of administering the property and affairs of the Indians under treaties and acts of Congress—*Seminole Nation v. United States, supra; Ross v. Stewart,* 227 U.S. 530; *United States v. Wildcat,* 244 U.S. 111; *Campbell v. Wadsworth,* 248 U.S. 169—no fraud is alleged in this case and there is no basis for such an allegation with respect to the action of Congress in August 1876 and February 1877. In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any

moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. [p. 685]

I cannot agree with the majority's view that the Court of Claims decided the Sioux's Fifth Amendment claim on the ground that since Congress had the legal authority to acquire its property under the 1877 act, the jurisdictional act allowed for no recovery by plaintiffs. The [239] court considered the case of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), to be almost identical to the *Sioux* case, not only on its facts but also with respect to the treaty and statutory provisions. The court carefully reviewed the principles announced by the Supreme Court in *Lone Wolf*, and subsequent cases, in ascertaining the proper criteria for determining any liability of the United States under the Sioux's legal claim. The court noted that Congress possessed plenary power over Indian tribes and, when necessary, the authority to legislate in whatever way it might choose with reference to the management and control of the property and affairs of the Indians, even though such action should be in conflict with some treaty provision and against the desire of the Indians. But the court also found it well established that:

> . . . the United States cannot, through Congress or otherwise, arbitrarily deprive the Indians of their lands or monies secured to them by a treaty or law of Congress, or to appropriate the lands of Indian tribes to its own purposes or give them to others without rendering or assuming an obligation to render just compensation therefor. [pp. 673, 674.]

The court entered detailed findings with respect to the United States' efforts to secure a relinquishment by the Sioux of a part of their reservation and to compensate the Indians therefor. The court concluded

> . . . In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for [240] what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay. [p. 667.]
>
> * * *
>
> In other words, if in the case at bar, Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the interest of the Indians, as the facts clearly show was the case, the Indians have no *legal right* to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which Congress stipulated should be paid and which has been and is being paid, and will continue to be paid until the Indians, with the assistance of the Government, became self-supporting. Congress possessed the authority to take the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof. [p. 668.]

Thus the Court of Claims adjudicated the Fifth Amendment claim on its merits in accordance with the applicable case law relating to legal claims for the taking of Indian lands.

The Court of Claims was well aware of the fact that Indian tribes could prevail in such claims and secure awards of "just compensation." The court discussed two such cases which were relied upon by the Sioux in support of their claim. Both cases, *United States v. Creek Nation,* 295 U.S. 103 (1935), and *Shoshone Tribe of Indians v. United States,* 299 U.S. 476 (1937), had recently been decided by the Supreme Court on writs of certiorari to the Court of Claims. In both cases the Supreme Court reversed the Court of Claims—holding that the Creek and the Shoshone were [241] entitled to awards of just compensation for takings by the United States within the meaning of the Fifth Amendment. The jurisdictional acts in both the *Creek* and *Shoshone* cases were virtually the same as the Sioux jurisdictional act. As the Court of Claims observed, the *Creek* and *Shoshone* cases "were clearly and unquestionably *legal* claims" [p. 673]. The Indian plaintiffs recovered in those cases because, as the court stated in Sioux, "Congress exercised an arbitrary power .... which deprived the Indians of their property without rendering, or assuming an obligation to render compensation therefor." [p. 673.] Thus, the Court of Claims distinguished *Creek* and *Shoshone* from the Sioux situation wherein Congress had acted in a manner which Congress deemed—and as the court found the facts clearly showed—was for the interest of the Indians and for what Congress deemed to be adequate consideration.

The Sioux failed to recover on their legal claim in *Sioux Tribe v. United States, supra,* (97 Ct. Cl. 613)

because the facts did not as a matter of law permit a finding that the United States had taken the Sioux lands under the Fifth Amendment. It was not, as the majority would have it, because of any jurisdictional bar to a recovery on the legal claim.

The Court of Claims in 1956 considered that the legal claim of the Sioux had been decided by 97 Ct. Cl. 613 and that the only suit which the Sioux could bring before the Indian Claims Commission was one based on Clauses (3) and (5) of Section 2 of the Indian Claims Commission Act.

> [242] ... Category (2), we think, involves a claim already decided by this court, *Sioux Tribe of Indians v. United States,* 97 C. Cls. 613, *cert. denied,* 318 U.S. 789 (1943), when this identical case was tried and decided before this court under a special jurisdictional act, 41 Stat. 738, authorizing the Court of Claims "to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon." The Court there held that the claimants had no legal right to any compensation other than that which was provided for by the Act of February 28, 1877, and stated that the only claim the Sioux Indians had, if they had one at all, was moral and until the court was given jurisdiction by the Congress to hear a moral claim it could not act. The Commission has been given the jurisdiction to hear moral claims under categories numbered (3) and (5). The appellant in this case can bring suit only under those categories. It has done so and relief has been denied. [*Sioux Tribe v. United States,* 146 F.Supp. 229, 239-240 (1956), *aff'g* Docket 74, 2 Ind. Cl. Comm. 646 (1954).]

This decision was later vacated and the case remanded to the Commission for a determination of whether the

plaintiff was entitled to have the proof in the case reopened. Therefore, the opinion has no force as a precedent. Nevertheless, my confidence in the correctness of my position is reinforced by the fact that in 1956 five judges of the Court of Claims unanimously reached the same conclusion I have reached. I note also that four of these judges participated in the unanimous 1942 decision with which we are now concerned.

/s/Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

APPENDIX C

TREATY OF APRIL 29, 1868 (15 Stat. 635)

Articles of a treaty made and concluded by and between Lieutenant-General William T. Sherman, General William S. Harney, General Alfred H. Terry, General C. C. Augur, J. B. Henderson, Nathaniel G. Taylor, John B. Sanborn, and Samuel F. Tappan, duly appointed commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, by their chiefs and head-men, whose names are hereto subscribed, they being duly authorized to act in the premises.

* * *

Article 2. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with

the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

* * *

Article 11. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase. * * *

Article 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

* * *

Article 16. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same; and it is further agreed by the United States that within ninety days after the conclusion of peace with all the bands of the Sioux Nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

* * *

ACT OF FEBRUARY 28, 1877 (19 Stat. 254)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That a certain agreement made by George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, be, and the same is hereby, ratified and confirmed: * * *

"Article 1. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869,

shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

"Article 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

* * *

"Article 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization;

to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick, and infirm excepted;) and as an incentive to industrious habits the Commissioner of Indian Affairs may provide that such persons be furnished in payment for their labor such other necessary articles as are requisite for civilized life. The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

* * *

APPENDIX D

Lieut. General Philip H. Sheridan, Commander, Division of Missouri, to Brig. General A. H. Terry, Commander, Department of Dakota, November 9, 1875 (*Letterpress copy, Confidential*), Sheridan MSS., Library of Congress

Confidential

Nov. 9th, (187)5

My dear Gen. Terry,

At a meeting which occurred in Washington on the 3rd of November, at which were present, the President of the United States, the Secretary of the Interior, the Secretary of War and myself, the President decided that while the orders heretofore issued forbidding the occupation of the Black Hills country, by miners, should not be rescinded, still no further resistance by the military should be made to the miners going in; it being his belief that such resistance only increased their desire and complicated the troubles.

Will you therefore quietly cause the troops in your Department to assume such attitudes as will meet the views of the President in this respect.

Yours truly
(Signed) P. H. Sheridan
Lieut. General

Lieut. General Philip H. Sheridan, Commander, Division of Missouri, to General William T. Sherman, November 13, 1875 (*Letter Press Copy*) Sheridan MSS., Library of Congress

Chicago Nov 13-75

My dear Genl Sherman

After my return from the Pacific I was obliged to go East to see Mr. Chandler about the Black Hills and my report has thus been delayed.

Terry has been sick, but is now better and I am expecting his report daily.

The enclosed copy of Confidential letter to Terry will best explain the present status of the Black Hills.

The whole thing has gone along about as I had expected.

The Terry letter had best be kept confidential. I met a host of your friends on the Pacific and was so kindly treated myself as to make my visit a very dear remembrance.

Yours truly
(sighed) PH Sheridan

General William T. Sherman, Commanding General of the Army, to Lieut, General Philip H. Sheridan, Commander, Division of Missouri, November 20, 1875, Sheridan MSS., Library of Congress

Headquarters Army of the United States

St. Louis. Mo. Nov-20 1875

Gen— P.H. Sheridan
Chicago, Ill.

P.H. Sheridan

Dear Genl—

Your letter of Nov-13 with enclosure was duly received, and would have been answered immediately. Only I know that the matter of the Black hills was settled at all events for this year. In the Spring it may result in Collision and trouble. But I think the Sioux Indians are all now so dependent on their rations, that they will have to do whatever they are required to do. My own idea of their Treaty is that settlements may now be made all along up the Western Boundary. And if some go over the Boundary into the Black Hills, I understand that the President and Interior Department will wink at it for the present.

* * *

Truly your Friend.
(Signed) W.T. Sherman

APPENDIX E

OCTOBER 29, 1974

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I have signed S. 3007, an act to authorize appropriations for the Indian Claims Commission for 1975.

It is a particular pleasure for me to be able to sign this bill because there are not many opportunities in life to take clear and decisive action designed to right a past wrong.

The background is this:

In 1877, the United States Government took over lands from the Sioux Indians in the Black Hills of South Dakota. At the same time, to prevent widespread starvation of these Indians deprived of their hunting grounds, the Government supplied them with food and other provisions for a number of years.

Earlier this year, the Indian Claims Commission ruled that the United States took the Black Hills lands illegally in violation of the Fifth Amendment. The 1877 value of the land and gold was estimated at $17.5 million which, together with interest from that point, boosts the value today to nearly $103 million.

However, the Indian Claims Commission Act of 1946 contains a provision requiring that the Government-supplied food and other provisions, valued at approximately $57 million, be used to offset the Indians' claims against the Government. If this offsetting provision stayed in effect, it would totally wipe out the $17.5

million original evaluation and leave the Sioux Indians with nothing.

The basic legal question of whether or not the Sioux have a legitimate claim against the United States over the Black Hills land is still being litigated in the courts. However, in passing this act, Congress has determined—and I agree—that if such a claim is held to be valid, it would be unfair and unjust to try to avoid paying it by deducting the cost of previously supplied food and provisions.

Although we cannot undo the injustices from our history, we can insure that the actions we take today are just and fair and designed to heal such wounds from the past.

No. 75-466

In the Supreme Court of the United States

OCTOBER TERM, 1975

STOLL WATERS OF INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK
Solicitor General

WALTER KENDALL HOFF
Assistant Attorney General

DAVID P. FINE
Attorney

Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-456

SIOUX NATION OF INDIANS, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *en banc* opinion of the Court of Claims (Pet. App. A) is reported at 518 F. 2d 1298. The opinion of the Indian Claims Commission is reported at 33 Ind. Cl. Comm. 151, and is reproduced in part in Pet. App. B.

JURISDICTION

The judgment of the Court of Claims was entered on June 25, 1975. The petition for a writ of certiorari was filed on September 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether certain Sioux claims for interest arising under the Fifth Amendment are precluded as *res judicata* by an adverse 1942 Court of Claims judgment.

STATUTES INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70a, provides in part:

> The Commission shall hear and determine the following claims against the United States * * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; * * *.
>
> All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

Other pertinent statutes are reproduced at Pet. 4–5 and Pet. App. C.

STATEMENT

The historical facts are related in *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613, certiorari denied, 318 U.S. 789, and in the opinion of the Court of Claims in this case (Pet. App. A). They may be summarized as follows: In 1874 and 1875, after it became public knowledge that the Black Hills, owned by the Sioux, contained gold in paying quantities, a large number of prospectors and miners converged upon these lands to seek their fortunes (97 Ct. Cl. at 627–628). The United States initially attempted to

keep these trespassers out, but, "it became practically impossible for the Government to expel the intruders or to prevent further intrusions into the Hills" (*id.* at 634). President Grant ordered federal forces to cease resisting or expelling the intruders, and the United States attempted to purchase the Black Hills from the Sioux. The negotiations were unsuccessful; the Sioux went to war. A disposition of the Black Hills was enacted by Congress as the Act of February 28, 1877, 19 Stat. 254 (*id.* at 629–633, 636–651). The transfer of the Black Hills to the United States by the Act of February 28, 1877, itself became a source of complaint among the Sioux, because less than ten percent of the adult male Indians had agreed to it, in violation of the provisions of Article 12 of the Treaty of April 29, 1868, 15 Stat. 635 (*id.* at 650; and see *Sioux Tribe of Indians* v. *United States,* 85 Ct. Cl. 181, 188).

On June 3, 1920, 41 Stat. 738, Congress enacted legislation permitting the Sioux to sue the United States on "all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States" and conferring jurisdiction on the Court of Claims "to hear and determine all legal and equitable claims of, if any, of said tribe against the United States." The Sioux[1] argued to the Court of Claims

[1] There are seven tribes of Sioux Indians. Only two, the Teton and Yanktonai Tribes, are principals here, for the Black Hills were within their historic territory. The other five Sioux Tribes (the Yankton, the Medawakanton, the Wahpeton, the Wahpakoota and the Sisseton) have other claims—some of which will doubtless produce large recoveries—pending before the Indian Claims Commission.

that the 1877 Act "took" the Black Hills under the power of eminent domain, and that just compensation under the Fifth Amendment should be paid. In 1942 the Court of Claims dismissed the suit. *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613.

After the enactment of the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, the same groups of Sioux again filed a Fifth Amendment taking claim for the Black Hills. The Indian Claims Commission found that the fair market value of the Black Hills land, as of February 28, 1877, was $17.1 million. It concluded that the United States committed a Fifth Amendment taking on that date and was liable for that sum, together with five-percent interest from the date of the taking. The United States appealed solely on the question of interest. It admitted liability for the principal award as damages for unfair dealings—for which the statute allows no interest. The Court of Claims reversed the award of interest, finding the Sioux "taking" claim, for which interest would have been allowed, to be barred by the *res judicata* effect of the 1942 case. The court left standing the principal award of $17.1 million as damages for unfair dealings (Pet. App. A).

ARGUMENT

The dispute in this case is about the meaning of a 1942 opinion of the Court of Claims. According to petitioners (Pet. 12):

> The central question presented by [the] petition is whether the 1942 dismissal was on the ground that the 1920 Act so limited the court's jurisdiction as to preclude consideration of a Fifth Amendment taking case like the Black Hills claim, or whether, in 1942, the court assumed jurisdiction, adjudicated the claim on the merits and dismissed on the ground that there was no Fifth Amendment taking.

Petitioners contend that the former interpretation of the 1942 decision is correct; the Court of Claims accepted the latter interpretation. There is no reason for further review of that decision: The Court of Claims is best qualified to ascertain the meaning of its own opinions.

Petitioners do not contend that *res judicata* does not apply to Indian claims cases, nor could they, for this Court has held that prior adjudications—even adjudications under substantive law that has since changed—are binding in later Indian claims cases. *United States* v. *Southern Ute Tribe*, 402 U.S. 159. See also *United States* v. *Creek Nation*, 196 Ct. Cl. 639, certiorari denied, 406 U.S. 929; *Western and Eastern Cherokee Indians* v. *United States,* 89 F. Supp. 1006 (Ct. Cl.) certiorari denied, 340 U.S. 903. So long as *res judicata* continues to be available as a defense to claims brought under the Indian Claims Commission Act, cases like the instant one represent simply a problem of applying to the facts of a particular case the general principles laid down by this Court and the Court of Claims.

The Court of Claims' *en banc* interpretation of its own prior decision is well-considered and reasonable. Petitioners must therefore address their claims to

Congress, which has the power to remove the bar of *res judicata* and the power to authorize the Indian Claims Commission to award interest regardless of whether the damages are due to a "taking" (as petitioners contend, and for which interest is now authorized) or are attributable to unfair dealings and unconscionable conduct (as the Court of Claims held, and for which interest is not now authorized).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
WALTER KIECHEL, JR.,
Acting Assistant Attorney General.
A. DONALD MILEUR,
RAYMOND N. ZAGONE,
CRAIG A. DECKER,
Attorneys.

NOVEMBER 1975.

---

[2] Last year Congress enacted Pub. L. 93–494, 88 Stat. 1499, which provided that offsets that might have reduced or eliminated the recovery of the Sioux in this case were to be disregarded.

U.S. GOVERNMENT PRINTING OFFICE: 1975